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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1833

SUN OIL COMPANY OF PENNSYLVANIA,
Appellant,

v.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF COMMONWEALTH OF PENNSYLVANIA,
and
Appellee,

LOCAL (8)-901 OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION on Behalf of Its Members and All Others Similarly Situated; GEORGE SWERDON, JR., ROBERT A. CROWLEY, LOUISE E. CHASSE, WILLARD A. SCHOLL. EDWARD J. FADDEN, NEANIE WILLIS, ROBERT MILLER, ANDREW MASSORELLI, ANTHONY G. ARCOMONE, IRVIN M. BUTLER, on Their Own Behalf and on Behalf of All Other Claimants Similarly Situated,
Intervenor-Appellees.

On Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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OPINIONS BELOW.

The decision of the Supreme Court of Pennsylvania is reported at 476 Pa. 589, 383 A. 2d 519 (1978), and is set forth in the Appendix, A2-A7.[1] The decision of the Supreme Court of Pennsylvania denying Appellant's Petition for Reargument is unreported, but is set forth at A1. The decision of the Commonwealth Court of Pennsylvania, affirmed by the Supreme Court of Pennsylvania, is reported at 19 Pa. Commw. Ct. 447, 338 A. 2d 710 (1975) and is set forth at A8-A21. The decision of the Pennsylvania Unemployment Compensation Board of Review, which the Commonwealth Court of Pennsylvania affirmed, is unreported but is set forth at A22-A39.

JURISDICTION.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(2), in that this appeal draws into question the validity of Pa. Stat. Ann. tit. 43, § 802(d), on the ground that it is repugnant to the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, insofar as that statute has been interpreted and applied by the Supreme Court of Pennsylvania to penalize an employer, through increased unemployment compensation taxes, for exercising federally protected rights, thus interfering with comprehensive national labor policy.

The decision of the Supreme Court of Pennsylvania sought to be reviewed was rendered on January 26, 1978. An order of that Court denying Appellant's Petition for Reargument was entered March 28, 1978. On March 31, 1978, a timely Notice of Appeal to this Court was filed in the Supreme Court of Pennsylvania. (A40-A41). This matter is appropriately brought to this Court by appeal in that throughout the proceedings below Appellant properly

(A1-A2)

1. References to matter contained in the appendix are to A—. References to the record are to R. —.

drew into question the validity of Pa. Stat. Ann. tit. 43, § 802(d), on the ground that the statute as interpreted is repugnant to the Constitution of the United States and the Supreme Court of Pennsylvania held in favor of its validity.

CONSTITUTIONAL PROVISION INVOLVED.

Article VI, Clause 2, of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding."

STATUTES INVOLVED.

Section 402(d) of the Pennsylvania Unemployment Compensation Law, Pa. Stat. Ann. tit. 43, § 802(d), which provides in pertinent part:

> "An employee shall be ineligible for compensation for any week—
>
> (d) In which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lock-out) at the factory, establishment or other premises at which he is or was last employed . . ."

The pertinent federal labor policy is embodied in the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U. S. C. §§ 141 *et seq.*, and is described *infra* at pp. 8-21.

QUESTION PRESENTED.

Where an employer has exercised federally protected rights, such as implementation of contract proposals after having bargained to a *bona fide* impasse, does the comprehensive national labor policy mandating state neutrality in labor disputes and leaving the area of collective bargaining to the free play of economic forces permit a state to penalize such activity by assessing additional unemployment compensation taxes against an employer and subsidizing a union's voluntary strike activity?

STATEMENT OF THE CASE.

This case raises fundamental questions concerning the extent and application of the doctrine of federal preemption in the area of national labor policy. Particularly, this matter involves the application of the preemption doctrine to the payment of unemployment compensation benefits to economic strikers under the provisions of Pennsylvania law.

This case arises from a challenge by Sun Oil Company of Pennsylvania ("Sun") to a finding of the Pennsylvania Unemployment Compensation Board of Review ("Board") that Sun's failure, following a *bona fide* bargaining impasse, to extend the prior collective bargaining agreement without change, indefinitely or until a new agreement was reached, constituted a lock-out, and that therefore the 1700 striking hourly production employees at Sun's Marcus Hook, Pennsylvania oil refinery were eligible for unemployment compensation benefits for the period during which they engaged in a voluntary work stoppage. (A3).

M73

On March 19, ~~1970~~, more than a month after having reached a *bona fide* impasse in bargaining, Sun's Marcus Hook refinery was struck. (A10, A29). The strike finds its

genesis in negotiations that commenced on November 2, 1972 between Sun and the Independent Refinery Workers Union of Marcus Hook ("IRWU") [2] concerning a contract scheduled to expire on January 6, 1973.[3] (A24, A25). Both Sun and the IRWU proposed substantial changes in the expiring agreement, however, a new agreement had not been reached by the expiration date. (A27). The parties agreed to continue the terms and conditions of the expired agreement on a day to day basis. By the end of January, 1973, Sun and the IRWU were in agreement on many provisions, but, on others, had reached firm, differing positions from which they would not deviate. (A27). After utilizing the services of the Federal Mediation and Conciliation Service in aid of reaching a final agreement, it became evident after several sessions that there was a *bona fide* impasse and the mediator so stated on February 13, 1973. (A29). By that time the parties had met in over 60 negotiating sessions. (R. 43a, 126a, 736a).

Following recognition of the impasse, Sun advised the IRWU that Sun would commence implementation of certain of its contract proposals if final agreement were not reached by February 17, 1973. (A29, R. 721a). Failing agreement, Sun began to implement several of its proposals with union cooperation, and the employees continued to work.

On March 14, 1973, the IRWU received information that employees at Sun's Toledo refinery had struck in support of demands for a new contract there. (R. 869a, 872a). On March 14, 1973, the IRWU executive committee

2. On May 2, 1973, Appellee, Local 8-901, Oil, Chemical & Atomic Workers International Union was certified as the exclusive bargaining representative for Sun's hourly production workers following an internal affiliation vote by the IRWU. (A23-A24).

3. Sun and the IRWU had enjoyed a 50 year collective bargaining history without experiencing a work stoppage associated with contract negotiations.

adopted a resolution to conduct a strike referendum on March 18, 1973, and urged the employee membership to reject the Marcus Hook contract offer, to strike and to join their "brothers in Toledo". (A32, R. 872a). Following the strike vote, the Marcus Hook strike started at midnight, March 18, 1973, and ended three months later when a new agreement was reached. (A33).[4]

In response to applications by the strikers for unemployment benefits, the Board undertook an investigation to determine what transpired at the bargaining table and, which party, in its view, was at fault in causing the work stoppage. The Board held that Sun's failure to extend indefinitely the precise terms of the expired contract and Sun's implementation of contract changes following impasse transformed an economic strike into a "lock-out" for purposes of Section 402(d) of the Pennsylvania Unemployment Compensation Law, Pa. Stat. Ann. tit. 43, § 802(d), thus entitling the strikers to benefits at the expense of at least $1.9 million in increased taxes to Sun. (A36-A37).

Sun has contended throughout these proceedings [5] that its rights to refuse to extend an expired contract and to implement contract proposals following impasse are

4. In determining eligibility under Pennsylvania's Unemployment Compensation Law, the Board and the reviewing courts necessarily found that Sun's implementation of portions of its contract proposals precipitated the Marcus Hook strike. (A5-A6; A11-A12; A36-A37). As we show, because Sun was exercising federally protected prerogatives, and did not, in any event, lock out employees, identification of the true "cause" of the strike is unnecessary for resolution of the issues presented here.

5. The substantial federal questions raised here were first presented by Sun in detail and considered on the merits by both the Commonwealth and Supreme Courts of Pennsylvania. Exceptions of Sun to Board Decision, R. 96; Brief of Sun to Commonwealth Court at pp. 33-46; Brief of Sun to Supreme Court at pp. 42-68; Opinion of Commonwealth Court, A13-A21; Opinion of Supreme Court, A3-A7. Thus, all parties and both Courts have considered the federal issues to have been properly raised.

fundamental economic weapons protected by federal law, that the state was preempted from penalizing Sun for exercising these rights, and that any interpretation of Section 402(d) causing such a penalty would violate the Supremacy Clause of the United States Constitution, Article VI, Clause 2.[6]

The Pennsylvania Commonwealth Court affirmed the Board, and rejected Sun's claim that Section 402(d) of Pennsylvania's Unemployment Compensation Law, as interpreted and applied, was preempted by the comprehensive national labor policy. Finding that the existence of a bargaining impasse was immaterial, that Court held that striking employees are eligible for unemployment benefits *whenever* an employer fails to extend indefinitely the precise terms and conditions of an expired contract. The Pennsylvania Commonwealth Court rejected Sun's contention that the Board's application of Section 402(d) was preempted by national labor policy.[7] (A17). The Pennsylvania Supreme Court, in affirming, for the first time interpreted Section 402(d) to require Sun and all other Pennsylvania employers engaging in collective bargaining to extend expired terms and conditions of employment indefinitely until agreement is reached under pain of subsidizing an economic strike and paying increased unemployment compensation taxes. The Pennsylvania Supreme Court specifically stated that this requirement would tend to encourage the parties to a labor dispute to refrain from

6. It is undisputed that Sun's exercise of these collective bargaining tactics was consistent with federal law as is evidenced by the refusal of the National Labor Relations Board ("NLRB") to issue an unfair labor practice complaint against Sun. (R. 736a).

7. The Commonwealth Court purported to create an exception where the employer can demonstrate to the satisfaction of the state that such implementation is "essential to the continued operation of the company." (A12). The existence of this exception raises substantial doubt concerning the credibility of the fault rationale employed to determine the cause of a strike.

exercising their rights while negotiating a new agreement. (A6-A7). The Court fully acknowledged that departure from its rule would weaken "this salutory effect." As a result, Pennsylvania employers now risk substantial penalty whenever they attempt to exercise their federally protected right to implement contract proposals, as a bargaining tactic, following a *bona fide* impasse.

THE FEDERAL QUESTIONS RAISED ARE SUBSTANTIAL.

The national labor policy guaranteeing free collective bargaining assures the parties to a labor dispute freedom from state interference with their collective bargaining rights. *Lodge 76, IAM v. Wisconsin Emp. Rel. Comm.*, 427 U. S. 132 (1976); *Amalgamated Assn. of St. Ry. Emp. v. Lockridge*, 403 U. S. 274 (1971); *Nash v. Florida Ind. Comm.*, 389 U. S. 235 (1967); *Local 20, Int'l. Brotherhood of Teamsters v. Morton*, 377 U. S. 252 (1964); *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236 (1959).

Decisions of federal courts and the NLRB have consistently granted the parties to a labor dispute substantial latitude with respect to the strategies each may pursue to promote legitimate goals following a *bona fide* impasse. An employer may refuse to continue an expired agreement, implement contract proposals, or, in some instances, actually bar the doors to the plant, all in compliance with the requirements of the NLRA. *Television & Radio Artists v. NLRB*, 395 F. 2d 622 (D. C. Cir. 1968) *aff'g.* 163 NLRB No. 55 (1967).

The decision appealed from subjects every Pennsylvania employer engaging in collective bargaining to the risk of subsidizing a union's ultimate economic weapon, the strike. Thus, Pennsylvania employers are effectively pressured to forego the use of legitimate post-impasse activity and, instead, are required simply to continue the existing collective bargaining agreement indefinitely without modification. Any deviation from the prescribed course of conduct will result in the imposition of an additional unemployment compensation tax on the employer, thereby penalizing what is otherwise the federally protected exercise of collective bargaining rights.

The decision of the Pennsylvania Supreme Court conflicts directly with the comprehensive national labor policy mandating state neutrality in labor disputes by penalizing the employer's exercise of federally protected rights, by requiring the indefinite continuation of expired collective bargaining agreements, and by requiring an employer to subsidize a strike, all in direct conflict, therefore, with the Supremacy Clause of the Constitution.

A state may not interfere with the collective bargaining process or infringe on the rights of the parties to a labor dispute to exercise the economic weapons made available to them by federal law. Any such interference would be directly contrary to the clearly expressed intent of Congress to preempt the area of labor relations and to create a uniform federal standard of behavior. *Lodge 76, IAM v. Wisconsin Emp. Rel. Comm.*, 427 U. S. 132 (1976); *Amalgamated Assn. of St. Ry. Emp. v. Lockridge*, 403 U. S. 274 (1971).

The decision of the Pennsylvania Supreme Court here, however, interprets the "strike-lockout" dichotomy of Section 402(d) of the Pennsylvania Unemployment Compensation Law, Pa. Stat. Ann. tit. 43, 802(d), so as to limit severely the scope of an employer's federally protected activities in the context of collective bargaining. In particular, Pennsylvania employers no longer have the right to implement changes in the terms or conditions of employment after a *bona fide* impasse has been reached in contract negotiations, the right to refuse to extend an expired collective bargaining agreement, or even the right to lock out employees under the provisions of the NLRA. Such a result flies directly in the face of the holding in *Television & Radio Artists v. NLRB*, 395 F. 2d 622 (D. C. Cir. 1968) *aff'g.* 163 NLRB No. 55 (1967), in which post-impasse implementation of contract proposals was specifically declared to have been within the arsenal available

to employers, and generally accepted principles of good faith bargaining. *Cox, The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401, 1423 (1958).

The decision appealed from has interpreted Section 402(d) in a manner which radically alters the delicate balance of protection, prohibition and laissez-faire in industrial relations purposely struck by Congress to promote industrial peace. In so doing, Pennsylvania now penalizes activity found by the NLRB to have constituted good faith bargaining,[8] and has adopted a rule justifying state investigation and assessment of an employer's implementation of contract proposals following a *bona fide* impasse in negotiations where there has been a subsequent strike, thereby imposing its own views on the employer as to the propriety or reasonableness of the tactics and positions taken at the bargaining table.[9]

8. In this case, the NLRB refused to issue an unfair labor practice charge against Sun (R. 736a).

9. The analysis undertaken to determine whether employer activity has resulted in a lock-out pursuant to the Pennsylvania Unemployment Compensation Law has been described in *Philco Corp. v. Unemployment Comp. Board of Rev.*, 430 Pa. 101, 103-04, 242 A. 2d 454, 455 (1968):

> "This is but another of those troublesome areas where the legal test as distilled from previous cases is easy to verbalize, but most difficult to apply to any given set of facts. Since the purpose of our unemployment compensation system is to compensate an individual when work has been denied him through no fault of his own, logically the test of whether a work stoppage resulted from a strike or a lock-out requires us to determine which side, union or management, first refused to continue operations under the status quo *after the contract had technically expired, but while negotiations were continuing.* As this Court stated in Vrotney Unemployment Compensation Case, 400 Pa. 440, 444-45, 163 A. 2d 91, 93-94 (1960), the question we must answer to decide on whose shoulders lay the responsibility for the work stoppage is the following:
>
> " 'Have the employees offered to continue working *for a reasonable time under the pre-existing terms and conditions* of employment so as to avert a work stoppage *pending the final settlement of the contract negotiations;* and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lockout" . . .' " 430 Pa. at 103-04, 242 A. 2d at 455. (Emphasis added).

This pervasive intrusion of Pennsylvania into the collective bargaining process violates the Supremacy Clause of the United States Constitution, Article VI, Clause 2 and Section 8(d) of the National Labor Relations Act. It is contrary to the statement of federal labor policy reaffirmed in *Lodge 76, IAM v. Wisconsin Emp. Rel. Comm.*, 427 U. S. 132 (1976).

> "To sanction state regulation of such economic pressure deemed by the federal Act 'desirabl[y] . . . left for the free play of contending economic forces, . . . is not merely [to fill] a gap [by] outlaw[ing] what federal law fails to outlaw; it is denying to one party to an economic contest a weapon that Congress meant him to have available.' *Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon,* 72 Col. L. Rev. 469, 478 (1972). Accordingly, such regulation by the State is impermissible because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (Citation and footnote omitted). *Id.* at 150-51.

In matters governing labor relations under federal law, the sweep of federal preemption is particularly broad. This Court has consistently stated that Congress, by enacting the NLRA, 29 U. S. C. § 141 *et seq.*, intended to alter the labor relations environment totally by granting the NLRB primary and exclusive jurisdiction over controversies involving employer-employee relations falling

within its purview.[10] *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236 (1959).

This scheme of federal regulation relating to collective bargaining is so pervasive that virtually all state actions are preempted except those which have only the most minor impact on federal policy. *Amalgamated Assn. of St. Ry. Emp. v. Lockridge*, 403 U. S. 274 (1971); *Local 20, International Brotherhood of Teamsters v. Morton*, 377 U. S. 252 (1964); *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236 (1959); *Cox, Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352-56 (1972).

This Court has held that when conduct even colorably falls within the language of either Section 7 [11] or 8 [12] of the NLRA, a state may not take action of any sort to regulate that conduct. *Amalgamated Assn. of St. Ry. Emp. v. Lockridge*, 403 U. S. 274 (1971); *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959). Thus, a state may not regulate the use of economic tactics in collective bargaining whether such tactics be protected, permitted or prohibited by federal law. *Lodge 76, IAM v. Wisconsin Emp. Rel. Comm.*, 427 U. S. 132 (1976); *Local 20, International Brotherhood of Teamsters v. Morton*, 377 U. S. 252, 257-59 (1964). Here, of course, because the activity was unquestionably protected, it is not necessary to consider the limits of activity colorably within the reach of the NLRA or whether prohibited activity should be protected from state interference by the preemption doctrine.

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10. This Court's recent decision in *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, — U. S. —, 46 U. S. L. W. 4446 (No. 76-750, May 15, 1978), does not alter the sweep of the preemption doctrine, especially as applied to the facts of this case. See discussion at p. 13, *infra*.

11. Concerning employee rights. 29 U. S. C. § 157.

12. Concerning prohibited employer practices, collective bargaining, and employer rights. 29 U. S. C. § 158.

This Court's recent opinion in *Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, — U. S. —, 46 U. S. L. W. 4446 (No. 76-750, May 15, 1978), does not suggest a contrary result. There, the union conduct in question clearly was not protected, nor had the NLRB been given the opportunity to rule on the propriety of the conduct. On the other hand, the state had a strong interest in enforcing its trespass law, a statute of general applicability, not directed solely at labor-management relations. This Court held that state enforcement was not preempted. Here, in contrast, both the holding of *Television & Radio Artists v. NLRB*, 395 F. 2d 622 (D. C. Cir. 1968) *aff'g.* 163 NLRB No. 55 (1967), and the action of the NLRB in refusing even to issue an unfair labor practice charge against Sun (R. 736a), stand clearly for the conclusion that Sun's activities were protected. There was never a doubt in Sun's case that the collective bargaining process fell within the scope of the NLRA.

Section 402(d) of the Pennsylvania Unemployment Compensation law, as interpreted, is far from a statute of general applicability. Indeed, it is intended to apply only in situations where the state law question is whether employees are on strike or have been locked out by the employer. Because the Pennsylvania courts and administrative authorities, through the guise of Section 402(d), have attempted to regulate the very activity covered by the NLRA and administered by the NLRB, it is apparent that Congress must have intended to preempt such statutes. The reasoning in support of this Court's holding in *Sears*, in fact, supports a preemption holding here.

Moreover, Pennsylvania's intensive investigation into the details of the ongoing collective bargaining process constituted an unwarranted and unconstitutional encroach-

ment on the collective bargaining process. *OCAW, Local 5-283 v. Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir. 1964); *General Electric Co. v. Callahan*, 294 F. 2d 60 (1st Cir. 1961), app. dismissed, 369 U. S. 832 (1962); *Delaware Coach Co. v. Public Service Comm.*, 265 F. Supp. 648 (D. Del. 1967).

The mere interposition of Pennsylvania into the bargaining process is sufficient to raise substantial preemption questions. Here, however, Pennsylvania has gone even further. By requiring Sun to agree to an indefinite extension of the pre-existing collective bargaining agreement, Pennsylvania deprived Sun of rights expressly protected by Section 8(d) of the NLRA which insures that a party engaged in collective bargaining may not be compelled to agree to or concede any proposal. *NLRB v. American Ins. Co.*, 343 U. S. 395, 404 (1952), 29 U. S. C. § 158(d). Additionally, Pennsylvania has proscribed Sun's federal right to implement changes in the terms or conditions of employment following a *bona fide* bargaining impasse.

It is undisputed that unemployment benefits would not have been granted under Section 402(d) if Sun had continued all the terms of the expired collective bargaining agreement in effect and the IRWU had then gone on strike. *Philco Corp. v. Unemployment Compensation Board of Review*, 430 Pa. 101, 242 A. 2d 454 (1968). It is equally undisputed, therefore, that the sole basis for the Pennsylvania Supreme Court's holding that Sun had engaged in "lockout" for purposes of Section 402(d), making claimants eligible for benefits, was Sun's exercise of its federally protected right to implement contract proposals following impasse. In the Pennsylvania scheme of unemployment compensation, the natural, and conceded, effect of such an award of benefits is to penalize the employer, Sun, by making it liable for substantial, additional unemployment taxes. As a result of the decision appealed from, Sun has been required to subsidize the strike taken against it and will be required to pay at least $1.9 million in additional unemployment compensation taxes, not because of any violation of federal labor law, but because Sun exercised its federally protected rights in a manner not satisfactory to the Commonwealth of Pennsylvania.

Whether a state may penalize otherwise protected activity is a substantial federal question deserving of this Court's full attention. The ultimate and certain imposition by Pennsylvania of substantially increased unemployment compensation taxes (as a result of the benefit payments) constitutes an attempt not only to compel an employer to agree to a union proposal but to agree to extend an entire collective bargaining agreement *ad infinitum* without change. This state action conflicts directly with Section 8(d) of the NLRA. *See, NLRB v. Burns Int'l. Security Services, Inc.*, 406 U. S. 272, 281-91 (1972).

The NLRB and the courts have created a comprehensive regulatory scheme governing the conduct of collective bargaining negotiations, distinguishing between tactics that are permitted under the NLRB, and those that are unlawful under Section 8(a) or Section 8(b) of the NLRA.[13] Among the arsenal of lawful weapons an employer may wield during bargaining is the right to change working conditions unilaterally after an impasse has been reached. *Television & Radio Artists v. NLRB*, 395 F. 2d

13. Even if a lockout, or other bargaining tactic, is arguably prohibited by Section 8(a), 29 U. S. C. § 158(a) or Section 8(b), 29 U. S. C. § 158(b), then, under the rule of *Lockridge, supra*, the state court may not penalize the use of such a tactic. The injured party's sole remedy would lie with the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 247 (1959). It is undisputed that Sun Oil's collective bargaining tactics were consistent with federal law, as evidenced by the NLRB's refusal to issue an unfair labor practice complaint against it. (R. 736a).

622 (D. C. Cir. 1968), *aff'g.* 163 NLRB No. 55 (1967); *Cox, The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401, 1423 (1958); *See, American Ship Bldg. Co. v. NLRB,* 380 U. S. 300 (1965). This "weapon of self-help" is part and parcel of the "balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community." *Local 20, Int'l. Brotherhood of Teamsters v. Morton,* 377 U. S. 252, 259 (1964).

Pennsylvania has usurped this balancing of the conflicting interests of employees, employers, unions and the public, and has concluded that even when an employer engages in lawful bargaining tactics, the employer may be penalized by being required to subsidize a strike paying increased unemployment compensation taxes. The Pennsylvania employer is caught in a whipsaw between exercising federally protected rights on the one hand and, on the other, paying a substantial penalty while subsidizing strikers. In the context of this case, the Pennsylvania rule has destroyed the balance created by Congress, under which employers are left free to make unilateral changes in working conditions after impasse by eliminating the economic disincentive of the strike weapon utilized by employees. The *Morton* holding is precisely on point.

> "If [the state law] can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [Section 8(a)(5)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." 377 U. S. at 259-60.

Pennsylvania's extraction of a penalty from Sun for having exercised federally protected rights is in direct conflict with

congressionally mandated labor policy that states remain neutral in labor disputes, and raises a substantial federal question. *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters,* — U. S. —, 46 U. S. L. W. 4446 (No. 76-750, May 15, 1978).

The necessity for Supreme Court resolution of this issue is not lessened by the fact that the impact on Sun is primarily financial. Federal labor policy and the NLRA prohibit Pennsylvania from requiring Sun to accede to the union's demands, or enjoining Sun from changing the provisions of the expired agreement after an impasse had been reached. *See, H. K. Porter Co. v. NLRB,* 397 U. S. 99 (1970). Similarly, the state cannot impose a financial penalty upon an employer for engaging in such protected activity. As this Court stated in *Garmon,* "[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." 359 U. S. at 247. Thus, what the state cannot prohibit, it may not penalize.

Nor is it necessary to prove that a financial penalty such as that sought to be extracted here will have an actual deterrent or chilling effect. In *Morton,* the prohibited damage award imposed upon the union was $9,000.00; in *Garmon,* a fine of only $1,000.00 was imposed. Obviously, such penalties are insignificant in comparison to the potential assessment of $1.9 million dollars against Sun. Yet, in neither *Morton* nor *Garmon* was the size of the penalty considered to be relevant by this Court. Any assessment, no matter how small, necessarily alters the delicate balance envisioned by Congress.

The inexorable effect of Pennsylvania's interpretation of Section 402(d) is to force an employer, under pain of substantial financial penalty, to agree to a post-impasse

union demand that an expired collective bargaining agreement be continued indefinitely and without change. Such an effect is contrary to the holdings of this Court in *Lodge 76, Lockridge, Garmon* and *Morton* that the employer's right to refuse is federally protected. As a result, the decision appealed from has created a direct clash between state law and overriding considerations of federal preemption and national labor policy. Accordingly, the payment of these unemployment compensation benefits pursuant to Section 402(d), as interpreted and applied, interferes impermissibly with Sun's rights guaranteed and preserved by the NLRA and national labor policy.

The newly imposed burden by Pennsylvania upon an employer to prove the economic necessity for the implementation of a contract proposal as a means of avoiding penalty is equally offensive to the NLRA and national labor policy. Such a rule gives the state the right and direction to scrutinize and investigate every aspect of the collective bargaining process.

Federal courts have repeatedly refused to permit similarly intrusive investigations by state agencies into the causes of work stoppages. *General Electric Co. v. Callaghan*, 294 F. 2d 60 (1st Cir. 1961), app. dismissed, 369 U. S. 832 (1962) (enjoining an investigation by the Massachusetts Board of Conciliation into the cause of a work stoppage); *OCAW, Local 5-283 v. Arkansas Louisiana Gas Co.*, 322 F. 2d 64 (10th Cir. 1964) (enjoining a similar investigation by the Oklahoma Board of Conciliation); *Delaware Coach Co. v. Public Service Commission*, 265 F. Supp. 648 (D. Del. 1967) (enjoining the commission's proceedings on an order to show cause why the bus company's certificate of public convenience and necessity should not be revoked where the order was sparked by a work stoppage).

The NLRA encourages collective bargaining and was not intended to compel or coerce agreement. State-sanctioned investigations have been held to be "coercive and a prohibited State interference with the voluntary collective bargaining process. . . ." *OCAW, Local 5-283 v. Arkansas Louisiana Gas Co.*, 322 F. 2d 64 (10th Cir. 1964).[14] In Sun's case, and for every Pennsylvania employer, each collective bargaining agreement must be negotiated in the fear that every bargaining demand, every negotiating session, every letter sent to the union, will be scrutinized by state agencies and that any deviation from the state's standards will result in the imposition of a substantial penalty on the employer. The very threat of such investigations particularly when coupled with the power to extract greatly increased taxes is sufficient to chill the exercise of federally protected rights and conflicts with established national labor policy. Indeed, it would be difficult to conceive that any agreement negotiated under such circumstances could be the product of free collective bargaining.

Finally, it should be noted this Court recently granted a Petition for Certiorari in *New York Telephone Co. v. New York State Department of Labor*, No. 77-961, (hereinafter "Telco") a case raising issues almost identical to those presented here. If anything, the facts and issues presented by Sun offer more compelling circumstances for review than those as to which review has already been granted in *Telco*.

---

14. In *Delaware Coach, supra*, it was held that since mere investigation and publicity constitute sufficient state coercion to imperil the freedom of collective bargaining, *a fortiori*, the threat of adverse action by a state agency, like the public utility commission, must have a coercive effect. The court stated that "[a]ny contract negotiated under such circumstances might not be solely the product of collective bargaining, and might frustrate the federal statutory scheme." 265 F. Supp. at 651.

Petitioners in *Telco* commenced a direct attack on the constitutionality of New York's statute providing unemployment compensation for strikers, N. Y. Labor Law § 592.1 (McKinney 1977), by seeking a declaratory judgment from the United States District Court for the Southern District of New York. The New York statute provides unemployment compensation to all strikers following an eight week waiting period. New York, like Pennsylvania, extracts additional unemployment compensation taxes from employers in respect of whose employees' unemployment compensation benefits have been paid. The District Court there "regard[ed] it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike or, once on strike, to remain on strike, in the pursuit of desired goals." 434 F. Supp. 810, 813-14 (S. D. N. Y. 1977) (footnotes omitted). The operation of this truism, combined with the substantial penalty extracted from employers by the New York statute, was found to conflict with established national labor policy, was preempted by Congress's apparent intent to occupy the field of labor relations to the exclusion of state regulation and, therefore, violated the Supremacy Clause of the United States Constitution, Article VI, Clause 2.

On appeal, the Court of Appeals for the Second Circuit reversed, holding that Congress, through the Social Security Act, had given the states freedom to provide unemployment compensation for strikers without regard to the effect such compensation might have on the delicately balanced collective bargaining process or on the federal policy of state neutrality in labor disputes. 566 F. 2d 388 (2d Cir. 1977). In so concluding, the Second Circuit interpreted the legislative history to show a Congressional

permissiveness with respect to the relationship of unemployment compensation to the collective bargaining process, a reading contrary to that of every other court to have considered the issue. Other courts dealing with the question have, quite correctly in our view, found the history to be ambiguous at best, thus not sufficiently definitive to have an effect on the outcome of the preemption issue. See discussion in Petition for Certiorari in *Telco* at pp. 11-14.

The questions presented to this Court in *Telco* are very similar to those presented here for review in that petitioners there seek a determination whether Congress intended to preempt the states from providing unemployment compensation benefits to strikers and whether Congress intended to preempt the states from providing such benefits without regard to the potentially adverse impact of such benefits on the otherwise untrammeled and free collective bargaining process.

A comparison of the basic ingredients of the *Telco* issues to be decided by this Court with those raised in Sun's appeal demonstrates that the Sun appeal raises matters of at least equal importance to federal labor policy which go to the very heart of the day-to-day collective bargaining process. For example, while the New York statute authorizes unemployment compensation benefits for strikers following an eight week waiting period without regard to the bargaining methods used by the employer, the Pennsylvania scheme, as interpreted by the Pennsylvania Supreme Court, encourages hindsight and second quessing by the reviewing body with respect to whether the employer's behavior has comported with Pennsylvania's concept of proper employer deportment during collective bargaining.

When the inherent chilling effect of the Pennsylvania procedure for awarding unemployment compensation to strikers is added to the substantial penalty extracted from

an employer who, in the exercise of federally protected bargaining tactics, transgresses the developing Pennsylvania concept of proper collective bargaining practices, it becomes apparent that the issues raised on this appeal are substantial, deserving a review by this Court and complementary to those issues already accepted by this Court for review in *Telco*.

CONCLUSION.

In light of the foregoing, Sun respectfully suggests that the federal questions presented on its appeal are substantial and requests that this Court note probable jurisdiction and set this matter for briefing and argument.

Respectfully submitted,

J. ANTHONY MESSINA,
JAMES T. GILES,
CHARLES J. BLOOM,
KENNETH L. OLIVER,
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Attorneys for Appellant,
Sun Oil Company of Pennsylvania.

CERTIFICATE OF SERVICE

I, VINCENT J. PENTIMA, one of the attorneys for Sun Oil Company of Pennsylvania, Appellant herein, hereby certify and say that on the 26th day of June, 1978, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States, I served upon Counsel for the Appellees three copies each of the foregoing Jurisdictional Statement, by mailing the same in certified mail, return receipt requested, first class postage prepaid, to their respective offices as follows:

1. J. Justin Blewitt, Jr., Esquire
   Deputy Attorney General
   Office of the Attorney General
   Capitol Annex
   Harrisburg, Pennsylvania 17120
2. Sydney Reuben, Esquire
   Unemployment Compensation Board of Review
   Labor and Industry Building
   Harrisburg, Pennsylvania 17121
3. Warren J. Borish, Esquire
   Meranze, Katz, Spear & Wilderman
   Attorney for Appellees, Local (8)-901, *et al.*
   1200 Lewis Tower Building
   Philadelphia, Pennsylvania 19102

It is further certified that all parties required to be served have been served.

Dated: June 26, 1978

VINCENT J. PENTIMA
PEPPER, HAMILTON & SCHEETZ
123 South Broad Street
Philadelphia, Pennsylvania 19109

Appendix.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Sally Mrvos
Prothonotary
Catherine E. Lyden
Deputy Prothonotary

Philadelphia, 19107
March 29, 1978

J. Anthony Messina, Esq.
Pepper, Hamilton & Scheetz
2001 Fidelity Building
Philadelphia, Penna. 19109

Re: Unemployment Compensation Board of Review, et al. v. Sun Oil Company of Pennsylvania
No. 131, January Term, 1976

Dear Mr. Messina:

This is to advise you that the following Order has been endorsed on your Petition for Reargument, filed in the above captioned matter:

"March 28, 1978.

Denied.

Per Curiam."

Very truly yours,

Sally Mrvos
Prothonotary
By CATHERINE E. LYDEN
Catherine E. Lyden
Deputy Prothonotary

CEL/c

cc: Warren J. Borish, Esq.
Joseph R. McFadden, Esq.
West Publishing Company
Argued 10/21/77—J-338
Decision—1/26/78

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW of Commonwealth of Pennsylvania, Appellee,

and

Local (8)—901 of the Oil, Chemical and Atomic Workers International Union on behalf of its members and all others similarly situated, George Swerdon, Jr., Robert A. Crowley, Louise E. Chasse, Willard A. Scholl, Edward J. Fadden, Neanie Willis, Robert Miller, Andrew Massorelli, Anthony G. Arcomone, Irvin M. Butler, on their own behalf and on behalf of all other claimants similarly situated, Intervenor-Appellees,

v.

SUN OIL COMPANY OF PENNSYLVANIA, Appellant.

Supreme Court of Pennsylvania.

Argued Oct. 21, 1977.

Decided Jan. 26, 1978.

Reargument Denied March 28, 1978.

Before EAGEN, C. J., and O'BRIEN, ROBERTS, POMEROY, NIX and MANDERINO, JJ.

OPINION.

NIX, Justice.

This was an action to determine the eligibility of approximately 1700 applicants for unemployment compensation benefits covering a period in which they were out of work during a labor dispute between their union and the Sun Oil Company of Pennsylvania.

The principal issue raised in this appeal [1] is whether section 402(d) of Pennsylvania's Unemployment Compensation Law, 43 P. S. § 802(d) (1964), is void under the Supremacy Clause of the United States Constitution by reason of federal preemption, to the extent that section 402(d) allows unemployment benefits to be paid to persons unemployed due to lockouts in labor disputes.[2]

The theory advanced by appellant-employer in this case, Sun Oil, is that the payment of unemployment benefits in labor disputes constitutes subsidizing the side of the employees. While Pennsylvania's unemployment compensation law does not allow for benefits to be paid to strikers, nevertheless, Sun Oil maintains that a lockout is just as much a weapon or technique in a labor dispute as a strike and that the payment of unemployment benefits to locked out employees restricts the employer's right to use lockouts in labor disputes. Such a result allegedly interferes with the general regulatory scheme for labor disputes provided by federal labor legislation. Therefore, Sun Oil argues that the state legislation is void due to federal preemption.

Sun Oil is not the first employer to raise such arguments. In *Hawaiian Telephone Co. v. Hawaii Dept. of Labor and Industrial Relations*, 405 F. Supp. 275 (D. Hawaii 1976) and *New York Telephone Co. v. New York Dept. of Labor*, 95 L. R. R. M. 2487 (S. D. N. Y. 1977), federal courts struck down state laws which allowed un-

1. This Court's jurisdiction is based upon the Appellate Court Jurisdiction Act, Act of July 31, 1970, P. L. 673, No. 223, art. II, § 204(a) 17 P. S. § 211.204(a) (Supp. 1977-78).

2. Section 402(d) of the Unemployment Compensation Law provides in pertinent part:

"An employee shall be ineligible for compensation for any week . . . (d) in which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he is or was last employed . . . ."

43 P. S. § 802(d) (1964).

employment benefits to striking employees for reasons similar to those advanced by Sun Oil in the present case. However, we believe that recent federal court decisions are dispositive of this issue. *Kimbell Inc. v. Employment Security Commission,* 429 U. S. 804, 97 S. Ct. 36, 50 L. Ed. 2d 64 (1976) involved a New Mexico statute providing for unemployment compensation to strikers. A state trial court held this law invalid for reasons similar to those advanced herein, but the New Mexico Supreme Court reversed. The Supreme Court of the United States dismissed the further appeal for want of a substantial federal question. About the same time that *Kimbell* was proceeding through the courts, the United States Supreme Court decided the case of *Super Tire Engineering Co. v. McCorkle,* 416 U. S. 115, 94 S. Ct. 1694, 40 L. Ed. 2d 1 (1974). In that case an employer sought a declaratory judgment that a New Jersey law according unemployment benefits to striking workers was invalid. By the time the district court's dismissal of the employer's action reached the United States Court of Appeals for the Third Circuit, the labor dispute had been settled, and the Court of Appeals dismissed the action for mootness. The United States Supreme Court considered only the issue of mootness and reversed and remanded to the Court of Appeals for further action. On remand, the Third Circuit had before it the Supreme Court's disposition in the *Kimbell* case, and concluded that the Court's action in *Kimbell* was controlling on the preemption issue and affirmed the dismissal of the district court. *Super Tire Engineering Co. v. McCorkle,* 550 F.2d 903, 906 (3d Cir. 1977).

Thus it is clear that in the absence of further action by the United States Congress, our General Assembly has the right to allow unemployment compensation benefits to locked out employees while denying benefits to striking employees.

Sun Oil also questions the award of benefits in this case contending that the employees were not locked out, but rather were unemployed as the result of strike action. We have clearly set forth the standards for determining whether a work stoppage is a result of a lockout or a strike:

> "As this court stated in *Vrotney Unemployment Compensation Case,* 400 Pa. 440, 444-45, 163 A. 2d 91, 93-94 (1969), the question we must answer to decide on whose shoulders lay the responsibility for the work stoppage is the following:
>
> 'Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms of the conditions of employment pending further negotiations? If the employer refuses to extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lockout" . . .'" *Philco Corp. v. Unemployment Compensation Board of Reveiw,* 430 Pa. 101, 103-104, 242 A. 2d 454, 455 (1968).

The facts in the instant case indicate that the contract between Sun Oil and the appellee-union expired January 6, 1973. The parties had a difference of opinion as to what constituted, under the circumstances, a fair period of time for expiration and notice of termination or strike. Finally, the contract was extended on a day to day basis as long as negotiations were in progress. However, after some five weeks with little progress in negotiations, Sun Oil advised the union that it would terminate the day to day extension agreement on February 17 and if an agreement were not reached by that time, it would implement some of its con-

tract proposals. Sun Oil and the union had several meetings regarding implementation of proposals, the last of which meetings occurred on March 14, 1973. At this time Sun Oil, having previously implemented certain proposals, advised that it intended to implement additional provisions on March 25, 1973. The next day, March 15, 1973, the union executive board adopted a resolution to conduct a strike vote among the membership on Sunday, March 18, 1973, at which time the membership voted to strike. Sun Oil points out that at midnight March 14, 1973, refinery workers at its Toledo, Ohio plant went out on strike, having rejected a wage offer which the union in the present case considered far superior to any offer that had been made to it. Sun Oil suggests that the events in Toledo were the motivating factor in the strike involved in this case. To counter this suggestion, the union's president and chief negotiator testified before the Unemployment Compensation Board of Review that there was dissatisfaction on the part of the union with some of the changes to be implemented, and that the union objected to putting more individual proposals into effect absent a complete collective bargaining agreement. Sun Oil's theory is that if the union strike was motivated by the events in Toledo rather than by Sun Oil's unilateral implementation of contract proposals, then the work stoppage was a strike, not a lockout. In effect, Sun Oil is asking this Court to adopt a rule requiring a claimant to prove that a union work stoppage was motivated *solely* by the employer's failure to maintain the status quo. This we decline to do. Such a rule would compel the Unemployment Compensation Board of Review and the Commonwealth Court to fathom underlying, subjective motivations for a work stoppage and would thus undermine the clarity and relative predictability embodied in the standard set forth in our *Vrotney* and *Philco Corp.* decisions. Additionally, the rule of *Vrotney* and *Philco*

Corp. tends to encourage employers and employees alike to maintain the status quo while negotiating a new agreement. The departure from this rule, urged by Sun Oil, would weaken this salutary effect.

It canot be disputed that Sun Oil's actions constituted a refusal to further extend the expiring contract and maintain the status quo. Accordingly, the prohibition of benefits under Section 402(d) of the Unemployment Compensation Law does not apply.

The Order of the Commonwealth Court is affirmed.

PACKEL, J., did not participate in the consideration or decision of this case.

OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA

OPINION BY JUDGE BLATT FILED: JUNE 4, 1975

This is an action to determine the eligibility of approximately 1700 applicants for unemployment compensation benefits covering a period in which they were out of work during a labor dispute between their union and the Sun Oil Company of Pennsylvania (Sun Oil).[1]

Section 402(d) of the Unemployment Compensation Law, 43 P. S. § 802(d) [2] provides that:

> "An employee shall be ineligible for compensation for any week—
>
> . . .
>
> (d) In which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he is or was last employed. . . ."

The referee and the Unemployment Compensation Board of Review (Board) found here that the work stoppage between March 19, 1973 and July 19, 1973 at the Marcus Hook refinery of Sun Oil constituted a lockout. The claimants were, therefore, awarded benefits. Sun Oil now appeals, however, alleging that the work stoppage was a strike so that benefits would be barred under Section 402(d) and that, in any event, federal law bars the payment of benefits to these employees.

1. Under agreement with Sun Oil, the employees' bargaining representative, the Independent Refinery Workers Union of Marcus Hook (IRWU), selected ten claimants to represent and bind Sun Oil and the other applicant employees in the determination of the issues raised herein.

2. Section 402(d) of The Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess. P. L. (1937) 2897, *as amended*, 43 P. S. § 802(d).

The collective bargaining agreement between Sun Oil and the Independent Refinery Workers Union (IRWU) was scheduled to expire on January 6, 1973. Prior to that time the parties had been bargaining in good faith to reach a new agreement, but, by the contract expiration date, a new agreement had not been reached and the parties instead agreed to continue working on a day-to-day basis under the terms and conditions of the contract which had expired. Negotiations continued for an additional five weeks when on February 13, 1973 a Federal Mediator, which had been assigned to the case, certified that the parties had reached an impasse. On the same date, February 13, Sun Oil sent a letter to the IRWU expressing concern over "unreasonable delay in many matters of vital importance to Management and the employees. . . ." The letter continued, "Consequently, unless a Contract settlement is reached by 12:01 A. M. Saturday, February 17, 1973, the Company gives notice that it is hereby terminating the day-to-day Contract extension. . . . If the Contract so expires on February 17, 1973, we intend to begin implementation of some of our proposals. We will appropriately advise the Union from time to time as we begin these implementations." On February 16, 1973, Sun Oil notified the IRWU that effective February 18, 1973 the company would be implementing provisions of "our Contract proposals" on the topics of bidding for job vacancies, vacation pay, and training for temporary assignments. On February 23 Sun Oil again notified the IRWU of the "further implementation of our latest Contract proposal". This time, effective, March 4, the company indicated that it would implement provisions concerning adjustment pay, service, seniority, employee status, and job progression procedures. Still another notice, on March 14, announced implementation, effective March 25, of the new proposal as to the distribution of overtime assignments among employees.

On the following day, March 15, the IRWU circulated a news bulletin among its membership informing them of a strike vote taken by employees of the Sun Oil Refinery at Toledo, Ohio. This bulletin indicated that the Toledo workers rejected "an offer that was far better than what was offered to the IRWU of Marcus Hook." That evening the IRWU president, Anthony Arcomone, recorded a message announcing to the employees that the union executive board had authorized a strike referendum "on Management's final Contract offer". He stated, "If we reject, we will strike at 12:01 A. M., Monday, March 19, and join our Brothers in Toledo." A vote of the membership was then taken, and, by a nine to five ratio, the IRWU rejected the proposal and work was stopped.

I. Strike vs. Lockout

Was this work stoppage a strike or a lockout? Our Supreme Court has held:

"Since the purpose of our unemployment compensation system is to compensate an individual when work has been denied him through no fault of his own, logically the test of whether a work stoppage resulted from a strike or a lock-out requires us to determine which side, union or management, first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing. As this Court stated in Vrotney Unemployment Compensation Case, 400 Pa. 440, 444-45, 163 A. 2d 91, 93-94 (1960), the question we must answer to decide on whose shoulders lay the responsibility for the work stoppage is the following: 'Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lockout" . . . .'" *Philco Corp. v. Unemployment Compensation Board of Review*, 430 Pa. 101, 103-104, 242 A. 2d 454, 455 (1968).

Neither the company nor the union, therefore, may issue an ultimatum without bearing the responsibility for the ensuing work stoppage, if one occurs. *Gray Unemployment Compensation Case*, 187 Pa. Superior Ct. 425, 144 A. 2d 856 (1958); *See Toma v. Unemployment Compensation Board of Review*, 4 Pa. Commonwealth Ct. 38, 285 A. 2d 201 (1971). When the work stoppage takes the form of a strike, therefore, but it is alleged to be in fact a lockout, it must be shown either that the union made the initial "peace" move by offering to continue the status quo or that it would have been futile for it to do so. *Philco Corp. v. Unemployment Compensation Board of Review*, 430 Pa. 101, 242 A. 2d 454 (1968).

Obviously the peace move here was made when the union agreed to the day-to-day extension of the contract. At the time of the strike vote, approximately ten weeks later, Sun Oil had already upset the status quo through the implementation of some of its contract proposals. At the time of the strike vote, therefore, additional peace offers by the union would appear to have become futile. Sun Oil argues, nevertheless, that responsibility for the work stoppage rests with the union here because the proposals which were implemented had apparent union approval and repre-

sented either no change from the prior contract or changes of such minor nature that employees would not reasonably object to them. This may be a credible position in the minds of Sun Oil, but it clearly was not credible in the minds of the Board, which was the lawful fact finder. The Board, in fact, probably relied upon the testimony of Anthony Arcomone, the union president, that many of the implemented changes were of substantial importance to the union membership, and that in spite of apparent union cooperation with respect to some of the implementations, others of the changes were met with dissatisfaction by the membership, and the Board found that the union objected to putting agreeable individual proposals into effect absent a complete collective bargaining agreement. The record supports this finding and, therefore, it must not be disturbed on appeal. *Chambers v. Unemployment Compensation Board of Reveiw*, 13 Pa. Commonwealth Ct. 317, 318 A. 2d 422 (1974).

Sun Oil argues, of course, that it has met the Philco test [3] of continuing operations under the terms and conditions of the expired contract and cannot be expected to have preserved the status quo for an indefinite period of time. And it is true that the status quo was preserved for a period in excess of five weeks subsequent to the expiration of the contract. It is, however, the reasonableness of continuing the status quo rather than the length of time it has been maintained that controls, and an employer altering the balance even after aiding in its maintenance for a considerable time, must still demonstrate that such action is essential to the continued operation of the company. *Cf. Lerch Unemployment Compensation Case*, 400 Pa. 446, 163 A. 2d 535 (1960); *Bakoski Unemployment Compensation Case*, 206 Pa. Superior Ct. 96, 211 A. 2d 124 (1965).

3. *Philco Corp. v. Unemployment Compensation Board of Review, supra*, 430 Pa. at 103-104, 242 A. 2d at 455.

Sun Oil does not argue here, nor does the evidence suggest, that such action was so essential.

We must conclude, therefore, as the Board concluded, that Sun Oil's "action in terminating the extension of the existing collective bargaining agreement and its actions in implementing its proposals on an item-by-item basis is inconsistent with the maintenance of the status quo." And although Sun Oil may well have believed that the implemented changes were of a minor nature and were for the employees' benefit, such determinations must be left to the collective bargaining process and are not the subject matter of unilateral action in the context of The Unemployment Compensation Law. In that context, therefore, we must conclude that the work stoppage here was a lockout.

II. Federal Preemption

Does the payment of unemployment benefits to IRWU members have a sufficient impact on the respective bargaining positions of Sun Oil and the IRWU so as to be invalid under the Supremacy Clause of the United States Constitution because it conflicts with the federal policy of uniform regulation of collective bargaining relationships?

The arsenal of public support now available to a work force unemployed during a labor dispute most notably includes food stamps, public assistance benefits through the program of Aid to Families with Dependent Children, and unemployment compensation. The availability of these benefits and the requirements necesesary to obtain them will vary greatly, of course, among the states. It is probable, too, that unions in recent years have incorporated some or all of these programs as fundamental components of their strike support programs.[4] It is no wonder, there-

4. A. J. Thieblot, Jr. and R. M. Cowin, *Welfare and Strikes* (1972).

fore, that the use of such public support by those unemployed during labor disputes has recently become subject to federal preemption attack.

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959); *Teamsters Local 20 v. Morton*, 377 U. S. 252 (1964); and *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U. S. 274 (1971) establish the general principle that the National Labor Relations Act preempts state regulation of labor conduct falling within the regulatory scheme of the federal law. As stated in *Lockridge, supra:*

> "The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." 403 U. S. at 286.

It was, however, recognized that the court could not "declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the states." *Lockridge, supra,* at 289. The concern is that one forum might enjoin, as illegal, conduct which the other forum would find legal, or that the state courts would restrict the exercise of rights guaranteed by the Federal Act. It has been held, therefore, that to impose upon a union under state law liability for damages suffered by an employer resulting from union activities not proscribed under federal law restricts the exercise of lawful labor activity under federal law. *Teamsters Local 20 v. Morton*, 377 U. S. 252 (1964).

Obviously the Pennsylvania Unemployment Compensation Law is not designed or intended to restrict or to regulate labor activity developed under the federal law. It is instead an exercise of the police powers of the Commonwealth adopted to avoid the serious menace to the health, morals, and welfare of the public which results from indigence during periods when employees become unemployed through no fault of their own.[5]

Against this state interest rests the federal labor scheme which clearly permits the use of strikes and lockouts as economic tools to compel concession by either the union or employer during the negotiation of collective bargaining agreements. *American Ship Building Company v. National Labor Relations Board*, 380 U. S. 300 (1965). The employer's use of the lockout will be frustrated, argues Sun Oil, by the deterrent effect of the increased tax rate which an employer will experience where massive benefits are payable, and also by the diminished economic impact upon employees that the payment of benefits itself would have upon the effectiveness of this bargaining tool. Thus,

5. *See* the Declaration of public policy as set forth in Section 3 of the Act, 43 P. S. § 752. The Unemployment Compensation Law, therefore, does not inject the state into the collective bargaining process so as to assess the bargaining demands of the parties in dispute for the purpose of encouraging a settlement. Were we to find such a purpose or effect resulting from the unemployment compensation hearings, we would have no doubt that the state law here would be invalid under the Supremacy Clause. *Oil, Chemical, and Atomic Workers International Union v. Arkansas Louisiana Gas Company*, 332 F. 2d 64 (10th Cir. 1964); *General Electric Company v. Callahan*, 294 F. 2d 60 (1st Cir. 1961). We can find no support in the statute or the record indicative of such a purpose or effect.

argues Sun Oil, federal law rules out the payment of benefits to employees out of work during a lawful lockout. The IRWU, on the other hand, argues that because Congress has not proscribed unemployment compensation benefits to workers unemployed during a labor dispute it cannot be said that the payment of such benefits does not fall within the federal scheme in the collective bargaining process.

The courts have confronted the preemption issue in similar actions where public benefits were paid to employees out of work during a labor dispute. In *ITT Lamp Division of the International Telephone and Telegraph Corporation v. Minter*, 435 F. 2d 989 (1st Cir. 1970), Cert. denied, 402 U. S. 933 (1971), a suit by two employers to enjoin the payment of welfare benefits under Massachusetts law asked whether or not the payment of such benefits to indigent strikers infringed upon the federal policy. Denying injunctive relief the Circuit Court there stated that the "record is almost bereft of any indication of significant impact [such payments might have] on either plaintiff." *ITT Lamp Division v. Minter, supra*, at 991 n. 3. In that case the court desired persuasive evidence to indicate the impact that welfare benefits might have upon the duration of a strike, the strikers' resolve, and other factors which would tend to disclose whether or not the federal balance had been tipped in favor of the union. Maintaining that position, in *Grinnell Corporation v. Hackett*, 475 F. 2d 449 (1st Cir. 1973), Cert. denied, 414 U. S. 858 (1973) the First Circuit again denied a similar petition by an employer, this time refusing to enjoin the payment of unemployment compensation benefits to strikers under Rhode Island law. Absent persuasive evidence as to how payment of benefits might affect the bargaining relationship, as was again the case, the court there viewed Congress as the appropriate forum to determine these issues, not the courts. Since then, however, the Supreme Court, upon review of an attack on a New Jersey statute permitting welfare payments to strikers, recognized the need to accord the federal preemption argument a judicial hearing, *Super Tire Engineering Company v. McCorkle*, 416 U. S. 115 (1974). And, relying on *Super Tire, supra*, a United States District Court preliminarily concluded that the payment of unemployment compensation benefits under Hawaiian law would probably sufficiently infringe upon the federal policy so as to justify enjoining payment pending a final determination of whether or not such payments are ruled out by the federal scheme of laws regulating labor disputes. *Hawaiian Telephone Co. v. State of Hawaii Department of Labor and Industrial Relations*, 378 F. Supp. 791 (D. Hi. 1974).

In light of *Super Tire, supra*, and of the Congressional history which reveals that the existing legislative record is not sufficiently clear to establish Congressional intent either way, *Grinnell Corporation v. Hackett*, 475 F. 2d 449 (1st Cir. 1973), we cannot subscribe to the IRWU's argument that Congress has resolved to permit the payment of benefits to workers during labor disputes as consistent with federal labor policy. We must, therefore, examine Sun Oil's arguments more closely to determine if the payment of unemployment compensation is indeed ruled out by the federal labor policy.

The First Circuit Court of Appeals has held that:

> "Where Congress has not clearly manifested its purpose to exclude state action which takes the form of exercise of its historic police powers, such state action will not be invalidated under the Supremacy Clause, 'in the absence of persuasive reasons', Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132,

142, 83 S. Ct. 1210, 1217, 10 L. Ed. 2d 248 (1963), or unless the administration of the state law 'palpably infringes' upon the federal policy. Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U. S. 761, 766, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945)." *ITT Lamp Division of the International Telephone and Telegraph Corporation v. Minter,* 435 F. 2d 989, 992-993 (1st Cir. 1970).

On its face, we find no persuasive reasons to invalidate Section 402(d) of the Act under the Supremacy Clause nor do we find any palpable infringement of federal policy. Situations might, of course, arise for which the application of this provision would clearly bear no relationship to the balancing of interests between employers and unions during a labor dispute. We find no infringement, for example, where payments would be made to those employees not involved in any labor dispute with their employer but who are locked out of work due to a plant shutdown resulting from a lockout of employees who are involved in a labor dispute. Nor do we think that payments to employees out of work as a result of a lockout illegal under federal law would palpably infringe upon the federal policy.

In this action, Sun Oil presents virtually no real evidence which demonstrates the impact that the payment of benefits to IRWU members might have upon the bargaining relationship of those two parties.[6] It relies upon the weight of its argument that substantial governmental support to these employees and the resultant increase in the tax rate of contribution by Sun Oil to the Unemployment Compensation fund will obviously strengthen the union's bargaining position and thus infringe upon the effective utilization of legitimate employer tools in the contract negotiating process. Without failing to recognize the great

6. This fact is probably explained by the apparent failure of Sun Oil to raise the preemption issue before the Board below.

caution with which other courts have approached this issue where persuasive evidence was lacking, there might be some merit to be found in Sun Oil's position. Earlier decisions might be distinguished. Welfare benefits in *Super Tire, supra,* and *ITT Lamp Division v. Minter, supra,* for example, would not reach nearly so large a portion of the unemployed union membership as would the unemployment compensation benefits here because such welfare payments are based upon the *need* of the recipient, a factor not considered for Unemployment Compensation applicants. Naturally, therefore, a court would desire persuasive evidence to substantiate any interference with the collective bargaining process. The unemployment compensation benefits, in *Grinnell v. Hackett, supra,* although payable to the entire membership of the striking union became available only after a seven-week waiting period. The likelihood that payments might affect the bargaining relationships was diminished, therefore, by the lengthy delay in receiving them. Understandably in that case, too, the court desired persuasive evidence to substantiate any interference with the collective bargaining process.

The payment of unemployment compensation benefits to striking employees in *Hawaiian Telephone Co., supra,* was preliminarily enjoined until hearings were conducted on the preemption issue, and it may be true that that case is not significantly distinguishable from the present one because, as in this case, there was a one-week waiting period and benefits were available to all of the union members. That case, however, remains undetermined on the merits as of this writing, and, in spite of any factors which may distinguish the other cases above from the one at hand, we cannot determine that the payment of unemployment compensation benefits here palpably infringes upon federal labor policy without any evidence at all to support

the argument. Palpable infringement in a case such as this must be more than a mere peripheral concern with federally regulated activity. It requires such an incompatibility between the laws that the application of the state law would frustrate the purpose of federal legislation. *Teamsters Local 20 v. Morton, supra.* Without persuasive evidence on that point, we can only speculate as to whether or not a work stoppage would be of longer duration in the presence of anticipated benefits; as to whether or not a union would stiffen bargaining demands; and as to whether or not an employer would be deterred from employing lawful economic measures to break the bargaining impasse.

While the regulation of labor disputes clearly falls within the purpose of the federal legislation, we lack the supporting evidence here to prove that federal regulation is frustrated. As much as Sun Oil may argue that the impact upon the collective bargaining process is self-evident, we must disagree. It can be argued with equal force that the receipt of benefits, which for the most part amount to no more than fifty percent of an employee's weekly earnings, constitutes such a severe diminution of the daily income of individual employees that the effectiveness of the lockout as an economic tool in the bargaining process is not significantly impaired. At any rate, we have no evidence in the record to support a finding on this matter involved. By the same token, the anticipated increase in the rate of contribution by Sun Oil to the unemployment compensation fund, although no doubt a large sum of money standing alone, may well constitute such a small percentage of overall expenses as to have but a negligible impact upon Sun Oil's bargaining position. Again, we have no evidence to support a finding either way. Not one word was spoken as to such effects before the Board, of course, for the issue was not raised.

In short, Sun Oil's argument sounds plausible, but it lacks evidentiary support. We must hold, therefore, that, absent more persuasive evidence than was presented here or until Congress acts in further clarification of its intent, the payment of unemployment compensation benefits under state law to employees out of work during a lockout does not per se interfere in the collective bargaining process to such an extent as to be clearly preempted by federal law.

Accordingly, we issue the following

ORDER

AND Now, this 4th day of June, 1975, the appeal by the Sun Oil Company of Pennsylvania is hereby dismissed and the decision of the Unemployment Compensation Board of Review is hereby affirmed.

President Judge Bowman dissents.

/s/ GENEVIEVE BLATT
Genevieve Blatt, Judge

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

LABOR AND INDUSTRY BUILDING
HARRISBURG, PENNSYLVANIA 17121

J. R. Weiner—Chairman
John Curtin, Jr.—Member
Joseph J. McAneny—Member

DECISION AND ORDER.

Serial No.
B-73-1-P-322
(See attached list)

S. S. Acct. No.
706-01-9180

Concerning the Claim of:
Louis E. Chasse, Et Al
201 Raymond Avenue
Aston, Pennsylvania 19014

Date and Nature of Referee's Decision:
March 19, 1974—The decision of the Bureau is affirmed and benefits are allowed.

Decision No.
B-122198

Decision Mailing Date
June 21, 1974

Employer
Sun Oil Corporation
P. O. Box 426
Marcus Hook, Pennsylvania

Date of Application for Benefits
March 18, 1973

Waiting Week Ending Date
March 24, 1973

Compensable Week Date(s)
July 21, 1973

Appeal From Referee's Decision Filed by
☐ Claimant X Employer

FINDINGS OF FACT:

The Board adopts the following Findings of Fact found in the Referee's Decision, the same being supported by competent testimony in the record:

1. This case arises from appeals taken from ten individual determinations issued by the Pennsylvania Bureau of Employment security under a Token Case Agreement wherein the parties involved agreed that final decisions rendered on the ten determinations will be precedent for the disposition of claims for benefits filed by employes of the Sun Oil Company Refinery, Marcus Hook, Pennsylvania, who are members of the bargaining unit represented by the Oil, Chemical and Atomic Workers International Union, Local 8-901.

2. Approximately 1700 employes who are hourly-rated production workers at the employer's Marcus Hook Refinery filed claims for unemployment compensation benefits.

3. The decision in this case will apply to all of the claimants with regard to their eligibility under the provisions of Section 402(d) of the Law.

4. The claimants are represented for collective bargaining purposes by the Oil, Chemical and Atomic Workers International Union, Local 8-901 (OCAW), which union was

certified as the collective bargaining agent by the National Labor Relations Board on May 5, 1973.

5. Prior to the certification of OCAW, the claimants were represented for collective bargaining purposes by the Independent Refinery Workers Union (IRWU).

6. The claimants who had been members of IRWU became members of OCAW, and OCAW retained the same leadership as its predecessor, IRWU.

7. IRWU and the employer had entered into a collective bargaining agreement on March 31, 1970, and this agreement which was amended February 26, 1971, had an expiration date of January 6, 1973.

8. The collective bargaining agreement contained, inter alia, the following provision:

ARTICLE XLVI

TERMS AND RENEWAL

> The provisions of this Agreement, as entered into on March 31, 1970, and as amended on this 26th day of February, 1971, shall be in effect and remain unchanged until 12:00 Noon, January 6, 1973, and for successive terms of one (1) year thereafter or until written notice of intent to terminate or modify this Agreement is given by either party to the other at least sixty (60) days prior to the expiration of any term. It is our mutual intent to meet during the notification period.

9. In accordance with the provisions of Article XLVI, the employer submitted a letter to the union on October 25, 1972, indicating its desire to terminate the Agreement, and on October 27, 1972, the union submitted a written notice to the employer to the same effect.

10. IRWU and the employer began negotiating for a new collective bargaining agreement on November 2, 1972, and the employer submitted a letter to IRWU which stated: (Claimant Exhibit #2)

> "During negotiations we shall be proposing carefully thought-out changes which will enable our Refinery to become more competitive with other refineries. Several of the changes to be proposed will result in substantial reduction in work force.
>
> "Upon reaching a contract settlement which meets Refinery needs, the Company will, separate and apart from these negotiations, make available a Special Early Retirement Program (see further details on the attached notice) for IRWU-represented employes who will be at least age 55 on June 30, 1973."
>
> "Included in this proposal are three conditions for determining the effective date of retirement:
>
> 1. A mutually satisfactory settlement with the IRWU on a new Contract,
>
> 2. the date the job no longer needs to be filled,
>
> 3. the date the satisfactorily trained replacements are available."

11. IRWU and the employer held negotiation meetings during the period from November 2 and December 21, 1972, and both parties submitted oral and written proposals for a new collective bargaining agreement.

12. On December 21, 1972, the employer submitted a lengthy document containing contract proposals included various changes in the existing collective bargaining agreement including job classifications, pension plan amendments and a general wage increase. (Claimant Exhibit #1)

13. IRWU notified the employer at that time that the union was withdrawing its written proposals and would bargain on the proposals submitted by the employer.

14. On December 27, 1972, IRWU submitted a letter to the management negotiating committee which stated as follows: (Employer Exhibit 3a)

December 27, 1972

Mr. J. E. Lilley, Chairman
Management Negotiating Committee
Sun Oil Company of Pennsylvania
Marcus Hook, Pennsylvania

Dear Sir:

SUBJECT: CONTRACT NEGOTIATIONS

At our Executive Board meeting held on Thursday, December 21, 1972, a motion was passed to conduct a strike vote among the members on Sunday, January 7, 1973.

The vote is to ascertain the membership acceptance or rejection of the Company offer as of January, 1973. If Management's proposal is rejected, the Union is to effectuate a strike on January 8, 1973 at 12:01 AM.

Very truly yours,

(Signed) ANTHONY ARCOMONE
Anthony Arcomone
President, I. R. W. U.

cc—Mr. R. E. Hallmark
Mr. J. A. Guthrie
Mgt. Neg. Comm. (4)

15. On December 27, 1972, the union submitted another letter to the employer which proposed extending the current agreement from 12 noon, January 6, 1973, until 12 midnight, January 7, 1973, and on December 29, 1972, the employer agreed to this extension.

16. On January 4, 1973, the parties discussed the possibility of a written extension of the existing collective bargaining agreement for a two-week period but they were unable to conclude an agreement because the employer conditioned its acceptance upon agreement by the union to give a 72-hour notice of its intention to strike and the union did not agree to this notice but offered a counterproposal to give a 72-hour notice of its intention to conduct a strike vote.

17. On January 6, 1973, the union and the employer agreed to continue negotiating and to extend the collective bargaining agreement on a day-to-day basis without a formal written agreement.

18. On January 30, 1973, the employer presented a completely formulated proposed contract containing 56 articles and several supplements. (Employer Exhibit 7B)

19. This proposal contained many provisions which were identical with the provisions in the prior collective bargaining agreement and it also contained provisions which involved changes in the pre-existing terms and conditions of employment.

20. Supplement No. 3, Job Classifications and Wage Rates, provided for wage increases and it also contained a section setting forth new rates as follows:

New Rates	*Effective 1/1/73*	*Effective 1/1/74*
°Operator "A"	6.40	6.72
°Operator "B"	5.74	6.03
°Trainee "III"	5.38	5.65
°Trainee "II"	5.02	5.27
°Trainee "I"	4.85	5.09
°Trainee Candidate	4.85°°	5.09°°
°Trainee—Oil Movement Pool	4.85	5.09
°Trainee—Laboratory Pool	4.85°°	5.09°°
°Mechanic—Refinery Mechanic	5.73	6.02

°New job classifications and wage rates effective 1/1/73. Employes will be eligible for these rates upon transferring to these classifications.

°°New hires after 12/31/72 will be paid $4.40/hour and $4.62/hour after 1/1/74.

21. On February 1, 1973, the employer made a written request that the union reply indicating what steps the union intended to take toward accepting or rejecting the company's offer on or before February 5, 1973.

22. The union, on February 2, 1973, submitted a reply to the employer stating in part as follows:

> "This union will make no announcement to you concerning any action involving acceptance of your contract proposals."

It also stated:

> "In our continuing attempt to reach a mutually agreeable contract, we have notified the State Mediation Conciliation service in Harrisburg to assist both parties in reaching a mutually satisfactory agreement."

23. Several meetings were held between February 5, 1973, and February 13, 1973, and although a state mediator attempted to bring the parties together, the parties bargained to an impasse as of February 13, 1973.

24. On February 13, 1973, the employer submitted a letter to the union (Employer Exhibit #10) which set forth its position as to its proposals and bargaining efforts and it also stated:

> "Consequently, unless a Contract settlement is reached by 12:01 AM Saturday, February 17, 1973, the Company gives notice that it is hereby terminating the day-to-day Contract extension that has existed by mutual consent of the parties since January 6, 1973. If the Contract so expires on February 17, 1973, we intend to begin implementation of some of our proposals. We will appropriately advise the Union from time to time as we begin these implementations.
>
> "If no Contract settlement is reached by February 17, 1973, this letter will also serve as notice of our cancellation of the understanding covered in my letter dated October 24, 1972, as revised November 10, 1972, to Mr. A. Arcomone, Union President, outlining arrangements for Contract bargaining. When and as your Union wishes to resume bargaining, before or after any such Contract termination, please contact my office, and we will arrange a mutually satisfactory time and place for negotiations."

25. The employer and the union met on February 16, 1973, to discuss the employer's plan to implement certain of the articles contained in the January 30 contract pro-

posals (Employer Exhibit 7b) and the employer indicated that effective February 18, 1973, it intended to implement Article XI—BIDDING; Article XXIX—Vacation Pay; and Article XII—WORK ASSIGNMENTS AND PROMOTIONS, Paragraph B—Operating Division; Paragraph 6—Temporary Assignments, Section a.—Training.

26. On February 23, at a meeting between the employer and the union, the employer notified the union that effective March 4, 1973, it intended to implement the following articles:

1. ARTICLE X—SERVICE, SENIORITY, AND EMPLOYE STATUS (including SUPPLEMENTS NO. 4 and 5)
2. Article XIII—REFINERY JOB PROGRESSION PROCEDURE
3. ARTICLE XXXI—ADJUSTMENT PAY
4. From letter JEL:SZ, 1/30/73, the following part of item 12-B:

> ". . . Certain Carpenter functions are being transferred to the Building Maintenance Department. As a result, the Carpenter Department becomes involved in a merger with (1) the Metals Section, and (2) the Building Maintenance Department. We propose that 2 job opportunities in the Building Maintenance Department be offered to the current Carpenter Prime Department employes in the Carpenter Department seniority order. . . ."
>
> "We will implement the above, and survey the present Carpenter Department in seniority order and transfer up to two Carpenters into Building Maintenance, effective March 4, 1973."

27. The union and the employer had another meeting on March 14, 1973, at which the employer notified the union that the employer did not intend to implement the proposed article providing for union-management meetings, and the employer further stated that it intended to implement the proposed article on overtime distribution with certain exceptions as of March 25, 1973.

28. Some of the proposals which the employer indicated that it intended to implement were substantially same as the provisions of the pre-existing collective bargaining agreement.

29. Some of the proposals, however, were of such a nature that changes in the terms and conditions of employment would result and some of the proposals would make substantial changes if other proposals, particularly those involving job concept, were brought into effect.

30. The employer had proposed changing job assignments in such a way that employes would be trained in a variety of skills and would be assigned to various types of work rather than being assigned to a particular function as they had been in the past. These concepts were known as the A-B Operator Concept which would pertain to Operating Divisions and Crew Concept which would pertain to the Maintenance Department.

31. The union had indicated its agreement to some of the employer's proposals as individual items to be included in a complete collective bargaining agreement but it protested putting them into effect on an individual basis.

32. The pre-existing collective bargaining agreement had provided for union-management meetings and the employer's proposed contract also provided for union-management meetings, but the employer notified the union that it did not intend to implement this proposed article.

33. While the parties were conducting negotiation meetings, the employer had instituted employe training procedures involving approximately 20 employes which was not provided for in the previous collective bargaining agreement. This training was discontinued after the union protested to management.

34. After the meeting on March 14, 1973, the union advised the employer that it intended to conduct a vote of the membership on the employer's contract proposals on Sunday, March 18, 1973.

35. A vote was conducted on Sunday, March 18, 1973, and the ballot submitted to the membership was as follows:

BALLOT

INDEPENDENT REFINERY WORKERS UNION

MARCUS HOOK, PA.

This is your ballot to state your choice as to whether you desire to accept the Company's final proposal or whether you desire to reject the Company's final proposal and effectuate a strike at 12:01 A. M. Monday, March 19, 1973.

MARK AN X IN ONE BOX ONLY

☐	☐
ACCEPT	REJECT and effectuate a STRIKE

Election Committee
Chairman, James Lavin

36. At about 8 p.m. on March 18, 1973, a union representative contacted the employer's chief negotiator and advised him the vote was as follows:

905—Strike
492—accept
3—void

37. A work stoppage ensued at the refinery at 12:01 a.m. on March 19, 1973, and the work stoppage remained in effect until Saturday, July 18, 1973.

38. The employer and the union held 44 meetings between March 19, 1973, and July 14, 1973, at which time a tentative agreement was reached subject to acceptance by the members of the union.

39. The membership of the union accepted the agreement which became effective July 14, 1973, and production resumed at the refinery on July 19, 1973.

The Board makes the following additional Finding of Fact:

40. The employer unilaterally implemented and put into effect several procedures which changed the terms of the pre-existing collective bargaining agreement.

DISCUSSION: The Bureau of Employment Security issued a determination granting benefits to the claimants under the provisions of Section 402(d) of the Law. The employer filed an appeal, and following a hearing at which witnesses for the claimant, represented by counsel, and employer representatives, represented by counsel, appeared and testified, the Referee affirmed the Bureau's determination. The employer filed a further appeal and the Board of Review scheduled the case for argument before the Board en banc. The case was argued before the Board en banc on May 29, 1974.

The Unemployment Compensation Law provides:

> "An employe shall be ineligible for compensation for any week—

(d) in which his unemployment is due to a stoppage of work which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he is or was last employed. . . .".

It is clear that the claimants became unemployed due to a stoppage of work which existed because of a labor dispute at the establishment at which they were last employed. The issue to be decided is whether the work stoppage was a strike or a lockout. The law provides that the responsibility for a work stoppage is assessed against the party whose actions constituted the final cause thereof, and it is the duty of the compensation authorities to ascertain the final cause and responsibility. *Irvin U. C. Case 198 Pa. Super. 308, 312, 181 A. 2d 854, 857 (1962).*

In *Philco Corp. v. Bd. of Rev. 430 Pa. 101, 242 A. (2d) 454,* the Pennsylvania Supreme Court commented with regard to the test to determine whether a work stoppage was the result of a strike or lockout as follows:

"This is but another of those troublesome areas where the legal test as distilled from previous cases is easy to verbalize, but most difficult to apply to any given set of facts. Since the purpose of our unemployment compensation system is to compensate an individual when work has been denied him through no fault of his own, logically the test of whether a work stoppage resulted from a strike or a lockout requires us to determine which side, union or management, first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing. As this Court stated in *Vrotney Unemployment Compensation Case, 400 Pa. 440, 444-45, 163 A. 2d 91, 93-94 (1960),* the question we must answer to decide on whose shoulders lay the responsibility for the work stoppage is the following:

'Have the employes offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a 'lockout'. . . .'"

The collective bargaining agreement in this case was due to expire on January 6, 1973, but it was extended on a day-to-day basis by the parties while negotiations continued. The union and the employer continued negotiations until January 30, 1973, at which time the employer submitted proposals for a complete Contract consisting of 56 Articles plus several supplements. The proposed Contract contained many articles which were identical with the pre-existing collective bargaining agreement, and it also contained proposed changes of a substantial nature particularly with regard to job classifications and functions to be performed by the employes. The union and the employer met to discuss the employer's proposed Contract several times between January 30, 1973, and February 13, 1973, but they were unable to reach an agreement and an impasse in negotiations developed. The employer then gave written notice to the union that unless settlement was reached by 12:01 a.m. Saturday, February 17, 1973, the employer was terminating the Contract extension. The employer further stated that it intended "to begin implementation of some of our proposals." The employer fur-

ther indicated that it was willing to continue negotiations before or after "any Such Contract termination." "Contract settlement" was not reached by 12:01 a.m. Saturday, February 17, and the employer gave notice to the union of its intention to implement various proposals in the near future. The testimony indicates that some of the proposals had been agreed to by the union as individual articles to be included in a complete collective bargaining agreement but the testimony does not support the conclusion that the union was willing to accept the proposals on a piecemeal basis. The employer took the position that the terms and conditions of the pre-existing collective bargaining agreement no longer applied and that it could implement its proposals on an item-by-item basis as long as the implementation of its proposals was discussed with the union prior to actual implementation.

The employer's action in terminating the extension of the existing collective bargaining agreement and its actions in implementing its proposals on an item-by-item basis is inconsistent with the maintenance of the status quo. The claimants continued to work for almost a month after the employer announced the termination of the extension of the pre-existing contract. During this period the employer announced the implementation of a number of Articles in its proposed Contract and took the position that it could determine unilaterally which terms and conditions of employment would apply. The employer's statements and actions indicated that the employer felt that it was not bound by the terms and conditions of the pre-existing Contract and that it could determine what terms and conditions would apply on an item-by-item basis. Since the employer terminated the extension of the pre-existing Contract and took the position that it could determine what terms and conditions of employment would apply, it failed

to maintain the status quo, and therefore, the responsibility for the work stoppage must be assessed against the employer and, accordingly, the work stoppage is considered to be a lockout within the meaning of Section 402(d) of the Law. *Lee National Corp. v. Unemployment Compensation Bd. of Rev. 206 Pa. Super. 96, 211 A. 2d 124.*

The employer cites *Arbechesky U. C. Case 174 Pa. Super. 217 and Miller U. C. Case 152 Pa. Super. 315* in support of its position to deny benefits to the claimants in this case. It should be noted that the cited cases involve situations where an employer changed or modified the terms and conditions of employment under an *existing Contract.* In the instant case, the Contract and its extension had been terminated by the employer and, therefore, the changes in modification made by the employer were not made under an *existing Contract.*

Since the work stoppage in the instant case constituted a lockout within the meaning of Section 402(d) of the Law, the claimants are eligible to receive benefits.

CONCLUSION OF LAW: The claimants cannot be disqualified from receiving benefits under the provisions of Section 402(d) of the Law.

ORDER: The decision of the Referee is affirmed and benefits are allowed.

UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW

/s/ J. R. WEINER
J. R. Weiner, Chairman
/s/ JOSEPH J. MCANENY
Joseph J. McAneny, Member

Board Member John Curtin, Jr. does not concur with this decision.

Claimant's Name and Address	*S. S. No.*	*Appeal No.*
Louis E. Chasse 201 Raymond Ave. Aston, Pa. 19014	706-01-9180	B- 73-1-P-322
George Swerdon, Jr. 224 Pennell Rd., A-3 Aston, Pa. 19014	188-12-0131	B- 73-1-P-323
Willard Scull 409 Shubrook Ave. Aston, Pa. 19014	163-07-1162	B- 73-1-P-324
Edward J. Fadden 608 Andrews Ave. Collingdale, Pa. 19023	186-16-2322	B- 73-1-P-325
Robert A. Crowley 825 Hood Rd. Swarthmore, Pa. 19081	203-24-2713	B- 73-1-P-326
Neanie Willis 2530 West 7th St. Chester, Pa. 19013	166-16-1024	B- 73-1-P-327
Robert Miller 1447 South Garnet Mine Rd. Boothwyn, Pa. 19061	185-03-1984	B- 73-1-P-328
Andrew Massaralli 1 East 9th St. Marcus Hook, Pa. 19061	163-07-1125	B- 73-1-P-329
Anthony Arcomone 921 Hyatt St. Chester, Pa. 19013	196-18-9129	B- 73-1-P-330
Irvin Butler Road 2, Box 879 Elkton, Maryland 21901	165-05-1434	B- 73-1-P-331

CERTIFICATE

I hereby certify that the foregoing pages contain the original documents, or true and correct copies of the record of proceedings before the Unemployment Compensation Board of Review in the subject case, as listed in the Index.

/s/ SYDNEY REUBEN
Sydney Reuben
Assistant Attorney General

Date: September 12, 1974

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 131 JANUARY TERM, 1976
(COMMONWEALTH COURT No. 1037 C. D. 1974)

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF COMMONWEALTH OF PENNSYLVANIA,

Appellee,

and

LOCAL (8)-901 OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION on Behalf of Its Members and All Others Similarly Situated; GEORGE SWERDON, JR., ROBERT A. CROWLEY, LOUISE E. CHASSE, WILLARD A. SCHOLL, EDWARD J. FADDEN, NEANIE WILLIS, ROBERT MILLER, ANDREW MASSORELLI, ANTHONY G. ARCOMONE, IRVIN M. BUTLER, on Their Own Behalf and on Behalf of All Other Claimants Similarly Situated,

Intervenor-Appellees,

v.

SUN OIL COMPANY OF PENNSYLVANIA,

Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that Sun Oil Company of Pennsylvania, the Appellant above-named, hereby appeals

to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Pennsylvania, entered January 26, 1978, affirming the Opinion and Order of the Commonwealth Court of Pennsylvania, and from the Order of the Supreme Court of the State of Pennsylvania, entered March 28, 1978, denying Appellant's Petition For Reargument.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

Respectfully submitted,

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J. Anthony Messina,
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CERTIFICATE OF SERVICE.

I, VINCENT J. PENTIMA, one of the attorneys for Sun Oil Company of Pennsylvania, Appellant herein, hereby certify and say that on the 31st day of March, 1978, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States, I served upon Counsel for the Appellees one copy each of the foregoing Notice of Appeal to the Supreme Court of the United States, by mailing the same in certified mail, return receipt requested, first class postage prepaid, to their respective offices as follows:

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It is further certified that all parties required to be served have been served.

Dated: March 31, 1978

/s/ VINCENT J. PENTIMA,
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Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1977
No. 77-1833

SUN OIL COMPANY OF PENNSYLVANIA,
Appellant

v.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF COMMONWEALTH OF PENNSYLVANIA,
Appellee

and

LOCAL (8)-901 OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION on Behalf of Its Members and All Others Similarly Situated; GEORGE SWERDON, JR., ROBERT A. CROWLEY, LOUISE E. CHASSE, WILLARD A. SCHOLL, EDWARD J. FADDEN, NEANIE WILLIS, ROBERT MILLER, ANDREW MASSORELLI, ANTHONY G. ARCOMONE, IRVIN M. BUTLER, on Their Own Behalf and on Behalf of All Other Claimants Similarly Situated,
Intervenor-Appellees

On Appeal From the Supreme Court of Pennsylvania

MEMORANDUM OF APPELLEE UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF COMMONWEALTH OF PENNSYLVANIA

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STATEMENT OF THE CASE

In Pennsylvania,[1] workers who are out of work because of a labor dispute are eligible for unemployment compensation benefits if the work stoppage is deemed a lockout, but are ineligible if it is a strike.[2] The Unemployment Compensation Board of Review of Pennsylvania (hereinafter "the Board of Review"), the administrative agency charged with the responsibility for making the final administrative decision regarding the eligibility of all applicants for unemployment compensation, found as a fact that the labor dispute in the instant case between Sun Oil Company and Local (8)-901 of the Oil, Chemical and Atomic Workers International Union was a lockout and awarded benefits to the employes (A22-A39).

Sun Oil appealed from the administrative decision to the Commonwealth Court of Pennsylvania, raising two issues. Sun Oil initially challenged the Board of Review's finding of fact that the work stoppage was a lockout. Alternatively, Sun Oil contended that, even if the stoppage was a lockout, the Pennsylvania statute which authorized the payment of unemployment compensation benefits to lockout victims conflicted with the Supremacy Clause of the United States Constitution and was therefore unconstitutional. Thus the first issue involved a question of fact, while the second was plainly an issue of constitutional law.

[1] Pennsylvania Unemployment Compensation Law, Section 402(d):

> "An employe shall be ineligible for compensation for any week—
>
> (d) In which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lockout)."

Pa. Stat. Ann., tit. 43, §802(d).

[2] Appellants' continual assertions that "strikers" receive unemployment compensation benefits in Pennsylvania and that employers are thus compelled to subsidize strikes, are totally belied by reference to the law.

On June 4, 1975, the Commonwealth Court affirmed the Board of Review's finding of fact that the labor dispute was a lockout, holding that "[t]he record supports this finding and, therefore, it must not be disturbed on appeal. [citation omitted] . . ." *Unemployment Comp. Bd. of Review v. Sun Oil Company*, 19 Pa. Cmwlth. 447, 338 A.2d 710 (1975) (A12). The Court also upheld the validity of the Pennsylvania statute and rejected Sun Oil's preemption argument:

> On its face, we find no persuasive reasons to invalidate Section 402(d) of the Act under the Supremacy Clause nor do we find any palpable infringement of federal policy. Unemployment Comp. Bd. of Review v. Sun Oil Company, 19 Pa. Cmwlth. 447, 338 A.2d 710 (1975) (A18).

Sun Oil appealed from both the factual and legal determinations to the Pennsylvania Supreme Court, which again affirmed both and dismissed the appeal in all respects. *Unemployment Comp. Bd. of Review v. Sun Oil Company of Pa.*, 476 Pa. 589, 383 A.2d 519 (1978), (A2-A7).

Since the highest court in Pennsylvania upheld the validity of a State statute, by deciding that it was not repugnant to the Supremacy Clause of the United States

Constitution, this Court has jurisdiction to review that determination and that determination alone, by appeal. 28 U.S.C. §1257(2). To the extent that the Appellant is seeking review of the State court's finding of fact that the labor dispute in question was a lockout, and not a strike, this Court should decline to undertake an independent examination of the underlying facts. *Fry Roofing Company v. Wood,* 344 U.S. 157, 160 (1952); *Grayson v. Harris,* 267 U.S. 352, 358 (1924).

ARGUMENT

The issue which this case presents for review is whether federal labor policy prevents the States from enacting laws making workers who are unemployed due to a lockout eligible for unemployment compensation benefits. Pennsylvania's unemployment compensation law grants benefits to lockout victims but denies them to strikers. 43 P.S. §802(d). The case is properly before this Court on appeal because the Pennsylvania Supreme Court upheld the validity of the Pennsylvania law in the face of the Appellant's argument that the payment of benefits to workers involved in a lockout so upset the balance between the bargaining positions of labor and management as to impermissibly conflict with the dictates of the National Labor Relations Act. *Unemployment Comp. Bd. of Review v. Sun Oil Company of Pa.,* 476 Pa. 589, 383 A.2d 519 (1978).

This issue is but part of the broader question whether workers involved in labor disputes should be entitled to receive benefits from various social welfare legislation, be it unemployment compensation, welfare or food stamps. This has been a significant political issue since the early 1930's. *New York Telephone Co. v. N. Y. State Dept. of Labor,* 566 F.2d 388, 391 (2d Cir. 1977), and has never been squarely addressed by this Court. Twice in the early 1970's, this Court denied certiorari in cases which sought to enjoin the payment of welfare and unemployment compensation benefits to strikers under the laws of Massachusetts and Rhode Island, respectively. *ITT*

Lamp Division of International Telephone & Telegraph Corp. v. Minter, 435 F.2d 989 (1st Cir. 1970), *cert. den.* 402 U.S. 933 (1971); *Grinnell Corp. v. Hackett*, 475 F. 2d 449 (1st Cir. 1973), *cert. den.* 414 U.S. 858 (1973). In 1976, this Court dismissed an appeal from a decision of the Supreme Court of New Mexico upholding the validity of a New Mexico law which authorized the payment of unemployment compensation to strikers, for want of a substantial federal question. *Kimbell, Inc. v. Employment Security Commission*, 88 N.M. 596, 544 P.2d 1161 (1975), *aff'd* 429 U.S. 804 (1976).[3] This summary dismissal has subsequently been relied upon by the Third Circuit as authority to dismiss a New Jersey employer's challenge to the payment of welfare benefits to strikers in that State. *Super Tire Engineering Co. v. McCorkle*, 550 F.2d 903 (3d Cir. 1977). *See, Hicks v. Miranda*, 422 U.S. 332, 334 (1975). Thus, the law appeared to be that the payment of social welfare benefits to workers involved in a labor dispute had been an issue clearly left by Congress to State regulation.

On March 27, 1978, this Court granted certiorari in *New York Telephone Co. v. N. Y. State Dept. of Labor*, 566 F.2d 388 (2d Cir. 1977), *cert. granted* U.S. (1978). The issue in the *New York* case is similar to the instant case in that both cases involve a preemption challenge to State statutes which permit the payment of unemployment benefits to persons out of work due to labor disputes in some circumstances. Both the Second Circuit in *New York Telephone Co. v. N. Y. State Dept. of Labor*,

[3] This Court recently made clear that the payment of unemployment compensation benefits to strikers is not preempted by the Social Security Act. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 482 (1977).

566 F.2d 388 (2d Cir. 1977), and the Pennsylvania Supreme Court in the instant case concluded that the respective unemployment compensation statutes of New York and Pennsylvania were not preempted by the National Labor Relations Act.[4] Since this Court has agreed to hear *New York Telephone Co. v. N. Y. State Dept. of Labor*, No. 77-961, it is clear that the legal issue involved in both cases is significant and substantial.

The Unemployment Compensation Board of Review of Pennsylvania believes that the Pennsylvania Supreme Court correctly decided the instant case and should be affirmed by this Court. But, recognizing that this Court has granted certiorari in the *New York* case, and believing that the Pennsylvania statute in question is distinguishable in such a way as may be determinative of the outcome, the Board of Review respectfully submits that, should this Court decline to dispose of the instant case by summary affirmance, that oral argument in the instant case be scheduled in conjunction with that of the *New York* case.

[4] There are significant differences between the New York and Pennsylvania statutes. In New York, workers who are out of work because of a labor dispute, be it a strike or a lockout, are entitled to benefits after an eight-week waiting period has elapsed. N.Y. Lab. Law §§590.9, 592.1 (McKinney 1977). In Pennsylvania, workers who have been locked out by their employer are eligible for benefits from the outset of the work stoppage while workers who are out of work because they are on strike are not eligible at all. Pa. Stat. Ann., tit. 43, §802(d).

CONCLUSION

For the reasons set forth above, the Unemployment Compensation Board of Review respectfully suggests that the decision of the Pennsylvania Supreme Court be summarily affirmed. Alternatively, the Board of Review suggests that the case be set for briefing and that argument be scheduled for the same day as argument in *New York Telephone Co. v. N. Y. State Dept. of Labor*, No. 77-961.

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In The

Supreme Court of the United States

October Term, 1977

No. **77-1833**

SUN OIL COMPANY OF PENNSYLVANIA,
Appellant,

vs.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF COMMONWEALTH OF PENNSYLVANIA,
Appellee,

and

LOCAL (8)-901 OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION on Behalf of Its Members and All Others Similarly Situated; GEORGE SWERDON, JR., ROBERT A. CROWLEY, LOUISE E. CHASSE, WILLARD A. SCHOLL, EDWARD J. FADDEN, NEANIE WILLIS, ROBERT MILLER, ANDREW MASSORELLI, ANTHONY G. ARCOMONE, IRVIN M. BUTLER, on Their Own Behalf and on Behalf of All Other Claimants Similarly Situated,
Intervenor-Appellees.

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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Intervenor-Appellees.

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

Appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Pennsylvania Supreme Court on the grounds that the question on which the decision of the cause rests is so unsubstantial as not to need

further argument and the decision of the Pennsylvania Supreme Court is clearly correct.

Respectfully submitted,

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THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

This appeal raises the question of the validity of certain provisions of the Pennsylvania Unemployment Compensation Law, Pennsylvania Stat. Ann. Tit. 43, §802(d), providing for the payment of unemployment compensation benefits to locked-out employees.

The appellant, Sun Oil Company of Pennsylvania, contends that this state statute is unconstitutional. It argues that the award of unemployment compensation benefits by the Commonwealth to locked-out employees and the assessment of additional unemployment compensation taxes against an employer impermissibly interferes with the national labor policy mandating state neutrality in labor disputes.

The appellee, Local (8)-901 of the Oil, Chemical and Atomic Workers International Union, asserts that the Commonwealth's decision to award benefits is a proper exercise of its police power and conflicts with no provision of federal law. A careful study of the congresional policy underlying Titles III and IX of the Social Security Act of 1935, 42 U.S.C. §§501 *et seq.*, 1101 *et seq.* which creates the national unemployment compensation program, clearly indicates congressional intent to leave the states free to establish their own policies regarding the unemployment compensation eligibility of employees who are out of work because of labor disputes. Furthermore, the system of collective bargaining created by the Labor Management Relations Act, 29 U.S.C. §141 *et seq.*, does not necessitate governmental neutrality in other areas of labor relations, so that locked-out employees may be paid benefits pursuant to state programs. Finally, it must be emphasized that the Pennsylvania statute does not allow payment of benefits to strikers — but only to persons unemployed "involuntarily" and "through no fault of their own." *Unemployment Compensation Board of Review v. Budzanoski,* 346 A.2d 864 (Pa. Cmwlth. 1975). Thus the federal

labor laws do not prevent the Pennsylvania Legislature from deciding that the public interest of the state will be served by the payment of unemployment compensation to all who lose their jobs through no fault of their own, including locked-out employees.

THE PROCEEDINGS BELOW

Appellees applied to receive unemployment compensation benefits pursuant to Pennsylvania law. Appellant instituted this action challenging the Commonwealth's authority to award such benefits to applicants involved in a labor dispute.

Sun Oil Company of Pennsylvania now appeals from the decision of the Pennsylvania Supreme Court affirming the decisions of the Commonwealth Court of Pennsylvania, No. 1037 C.D. 1974 and the Unemployment Compensation Board of Review, which awarded unemployment compensation benefits to the membership of Local (8)-901 of the Oil, Chemical & Atomic Workers International Union, and found that the Commonwealth had the right to award such benefits.

ARGUMENT

I.

THE PENNSYLVANIA SUPREME COURT DECISION THAT THE PENNSYLVANIA GENERAL ASSEMBLY HAS THE RIGHT TO ALLOW UNEMPLOYMENT COMPENSATION BENEFITS TO LOCKED-OUT EMPLOYEES WHILE DENYING BENEFITS TO STRIKING EMPLOYEES SHOULD BE AFFIRMED.

A. The Legislative History of the Labor Management Relations Act and the Social Security Act Evidences Congressional Intent to Leave the States Free to Establish Their Own Unemployment Compensation Policies When Employees are Out of Work Due to a Labor Dispute.

The Court faces the question of whether Congress intended to prohibit state unemployment compensation laws which provide benefits to those who lose their jobs through no fault of their own, including locked-out employees, or whether it intended to leave the states free to regulate in this area.

The Court faces a similar issue in *New York Telephone Company v. New York State Department of Labor*, 566 F.2d 388 (2d. Cir. 1977), *cert. granted*, ____ U.S. ____, 98 S. Ct. 1519 (1978) (hereinafter "Telco").[1]

Nevertheless, it is respectfully suggested that the instant case is distinguishable and therefore, should be affirmed.

Appellee urges that the question is not one of federal pre-emption, but rather of a balancing of two equally important and viable federal policies. One policy, as reflected by the Social Security Act, delegates responsibility to the state to set up

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1. See the discussion below at I.B.

unemployment compensation programs. The other policy, as reflected by the Labor Management Relations Act (LMRA), 29 U.S.C. §141, *et seq.* establishes a comprehensive statutory code for industrial-labor relations. The pertinent provisions of the Social Security Act deal with the conditions of eligibility for state unemployment compensation programs, whereas the LMRA has nothing to do with public assistance or unemployment compensation benefits. Therefore, the Social Security Act should be treated as the governing law.

A review of the relevant legislative history justifies this conclusion. Congress's initial decision not to restrict states in determining unemployment compensation eligibility has never been changed — even though Congress has had several opportunities. In addition, the congressional conception of government neutrality in the labor field does not warrant the conclusion that Congress intended the labor market to be completely free of all governmental influence.

The present concern is with the alleged conflict of two federal policies: the national labor policies, reflected by the LMRA, and the national unemployment compensation policies, as reflected by Titles III and IX of the Social Security Act of 1935.

Under the Social Security Act, states obtain federal funds for the payment of unemployment compensation benefits if they adopt unemployment compensation laws which are approved by the Social Security Board. Neither at the time of adoption of this Act, nor at any time since, has Congress restricted the states in their determination of the eligibility of those out of work due to labor disputes. In fact, numerous references are made in congressional reports and records that ". . . the states shall have broad freedom to set up the type of unemployment compensation they wish . . ." H. Doc. No. 81, 74th Cong., 1st Sess. pp. 13, 16. See also S. Rep. No. 628, 74th Cong., 1st Sess. p. 4; 79 Congressional Record 5782 (1935) (Remarks of

Congressman Cooper); 79 Congressional Record 9284 (Remarks of Congressman Wagner); 115 Congressional Record 34106 (1969) (Remarks of Congressman Mills).

Such clear congressional statements of policy clearly refute appellant's basic argument that the LMRA pre-empts such programs as challenged herein.

The conclusion that Congress did not intend federal labor law to restrict the states in their creation of unemployment programs is reinforced when one looks at other programs created by Congress. It was implicit in the original National Labor Relations Act (NLRA) of 1935 that other governmental programs would necessarily have some influence on the labor market. For example, Section 903(a)(5)(A) of the Social Security Act itself, forbids workers from eligibility for unemployment compensation benefits for refusing to accept new work "if the position offered is vacant due directly to a strike, lockout, or other labor dispute." The Railroad Unemployment Insurance Act, 45 U.S.C. §351 *et seq.*, provides compensation for strikers under specified conditions. And the Food Stamp Act of 1964, 7 U.S.C. §2011, *et seq.*, makes eligibility dependent upon state agency determination.[2] Such legislation further reinforces the obvious conclusion that additional governmental influence on the labor market was not precluded by the LMRA.

In determining congressional intent, "Congressional awareness, [of the LMRA's compatability with other legislation which influences the labor market], the availability of opportunities to act, and Congressional inaction in closely related matters, are also relevant . . ." *Grinnel Corp. v. Hackett*, 475 F.2d 449, *cert. denied*, 414 U.S. 858 (1973).

---

2. It is important to note that an amendment to bar receipt of food stamps by striking workers was rejected by the Senate. H. Conf. Rep. No. 1908, 90th Cong., 2d Sess., at 2. A similiar amendment to the program of aid to families with dependent children was also rejected.

Obviously, Congress has been aware of the controversy concerning the payment of any kind of benefits to workers involved in a labor dispute.

Neverthless, it has refrained from enacting any prohibition against such benefits, even though the Social Security Act and the Labor Management Relations Act[3] have been amended several times.

Thus it can only be concluded that Congress did not intend the Labor Management Relations Act to usurp state power to create an unemployment compensation law.[4]

B. This Case Should be Affirmed Because the Pennsylvania Statutory Scheme is Distinguishable From the New York Statutory Scheme Involved in *Telco*.

The issue in *New York Telephone Company v. New York State Department of Labor*, 566 F.2d 388 (2d. Cir. 1977), *cert.*

3. A provision depriving strikers of the right to collect unemployment compensation was eliminated from the final version of the Labor Management Relations Act of 1947, NLRB legislative history of the Labor Management Relations Act, 1947, at 303-304.

4. Sun Oil has presented an argument in this appeal which has not been previously raised below. It argues that the Unemployment Compensation Board's determination of what constitutes a lockout is an unconstitutional interference with its federally protected rights guaranteed by the National Labor Relations Act. This argument is easily disposed of using the same analysis presented above. Congress did not intend the field of unemployment compensation to be unregulated. Regulation of this area was delegated to the states. Congress chose not to limit the states in their performance of this responsibility. Therefore, a determination by the State Unemployment Compensation Board applying the state statutory scheme is within the Board's delegated duties. Sun Oil has not been deprived of any right it may possess to lockout employees, nor has Sun Oil been forced to agree to any type of proposal. The state is merely granting unemployment compensation benefits to those it deems eligible therefor, pursuant to the authority delegated to it by the Social Security Act.

granted, ____ U.S. ____, 98 S. Ct. 1519 (1978) is the constitutionality of New York's unemployment compensation statute. That statute permits employees who are involved in a "strike, lockout, or other industrial controversy" to collect unemployment compensation after a waiting period of 8 weeks. New York Labor Law §590.9, §592.1 (McKinney 1977).

The statute challenged in the instant case is distinguishable from the *Telco* statute.

While the New York statute grants benefits to all strikers, the Pennsylvania statute grants benefits only to locked-out employees. Pennsylvania Unemployment Compensation Law, §402(d), Pa. Stat. Ann. Tit. 43 §802(d). The Pennsylvania General Assembly's statement of the purpose of this law manifests their intent to provide an income to persons unemployed "involuntarily" and "through no fault of their own". Unemployment Compensation Law, §3, 43 Pa. Stat. Annot. §752. This difference in the statutes is reflected in their impact on the labor market. The argument that the New York statute forces an employer engaged in collective bargaining to subsidize the union's ultimate economic weapon — the strike — is inapplicable to the Pennsylvania statute. Another argument inapplicable to the instant case is that the New York statute encourages a continuation of striking and strengthens the union's bargaining position. The Pennsylvania employees did not strike, didn't wish to strike, and in fact were anxious to return to work. Their bargaining position was not strengthened by granting them unemployment benefits, which are but a small portion of their weekly salary. The payment of benefits did not encourage the continuation of the strike. These employees wanted to return to work; it was their employer who barred their return.

Upon the challenged statute, the Commonwealth of Pennsylvania remains neutral in all such labor disputes. Employers are not deprived of their right to lockout. The

Commonwealth acts merely to protect all of its citizens from the serious menace to health, morals and welfare due to unemployment.

The distinction between those unemployed through no fault of their own and those unemployed by choice minimizes any possible effect on the labor market and distinguishes the Pennsylvania statute from the New York statute. This distinction, viewed in light of all of the arguments advanced previously, further supports appellee's position that the decision below should be summarily affirmed and that jurisdiction should not be accepted.

II.

IN THE ALTERNATIVE, THE DECISION TO ACCEPT JURISDICTION IN THIS CASE SHOULD BE DEFERRED UNTIL AFTER *TELCO* IS DECIDED.

If the Court decides not to affirm this case, any jurisdictional decision should be deferred until after the *Telco* decision. The presence of a substantial federal question is essential to the jurisdiction of the Supreme Court. A federal question cannot be so explicitly foreclosed by a prior decision of the Supreme Court as to leave no room for real controversy. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308.

The arguments advanced in support of the constitutionality of both the New York statute and the Pennsylvania statute are premised in part on an interpretation of congressional intent in enacting the Labor Management Relations Act and the Social Security Act. Therefore, if the New York statute is upheld on the basis of the Court's analysis of congressional intent, the substantiality of the federal question in *Sun Oil* will be foreclosed, and the Supreme Court will be forced to dismiss this case for lack of a substantial federal question. On the other hand, if the New York statute is held to be unconstitutional, *Sun*

Oil must be heard on its own merits due to the differences in statutory schemes (as discussed above).

III.

IF THE COURT DECIDES TO TAKE JURISDICTION OF THIS CASE, IT SHOULD BE HEARD SIMULTANEOUSLY WITH *TELCO* IN ORDER TO RESOLVE BOTH MATTERS EXPEDITIOUSLY.[5]

Although there are factors unique to each case, in both *Telco* and *Sun Oil* the Court must analyze the legislative intent behind the LMRA and the Social Security Act. Both cases should be heard together in the interests of economy, expedience and avoidance of duplication.

Appellees are particularly interested in expedience since they filed for benefits more than five (5) years ago. Quick resolution of this issue is also a concern of the Court. In *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971), this Court held that §303(a)(1) of the Social Security Act, 42 U.S.C. §503(a)(1) requires that states pay unemployment insurance benefits *immediately* after the initial administrative determination of a claimant's eligibility. The mandate of *Java* has not been lived up to here, and appellees still await receipt of their benefits. Therefore, it would be in the best interests of both the Court and appellees to hear both cases together and resolve this matter as soon as possible.

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5. As indicated in argument I.B, the Pennsylvania statutory scheme is different from the New York statutory scheme. Therefore, if the Court finds in *Telco* that the New York statute is unconstitutional, this case must be heard on its own merits.

CONCLUSION

The Pennsylvania Supreme Court's holding that the Pennsylvania General Assembly has the right to allow unemployment compensation benefits to locked-out employees while denying benefits to striking employees is obviously correct. Furthermore, the questions upon which this cause depend are so unsubstantial as not to need further argument. Therefore, appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Pennsylvania Supreme Court.

Respectfully submitted,

s/ Warren J. Borish

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